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 LAW LIBRARY







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REPORTS OF CASES

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8

ARGUED AND DETERMINED

0

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW-YORK;

WITH

11

NOTES, REFERENCES, AND AN INDEX.

BY FRANCIS KERNAN  
Counsellor at Law.



VOL. I.

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*Rec. Feb. 14, 1856*

*L. R. R.*

## Judges of the Court of Appeals.

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HON. ADDISON GARDINER, CHIEF JUDGE.

“ HIRAM DENIO,  
“ ALEXANDER S. JOHNSON, } JUDGES.  
“ CHARLES H. RUGGLES,

HON. SAMUEL L. SELDEN, } Judges of the Supreme Court, and  
“ AMASA J. PARKER, } *ex officio* Judges of the Court of  
“ WILLIAM F. ALLEN, } Appeals from January 1854, to  
“ HENRY P. EDWARDS, } January 1855.



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CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW-YORK.  
JUNE TERM, 1854.

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**MATHEWS and others *against* THE HOWARD INSURANCE CO.**

In cases of insurance the law, in the absence of fraud, looks to the proximate cause only of the loss in determining whether it was caused by a peril insured against.

A collision is a peril within a policy insuring against the perils of the sea or lakes. Where the immediate cause of loss to a vessel is a peril expressly insured against, it is not a defense that the negligence of the master and crew occasioned such peril or brought her within it. L

Under a policy of insurance against the usual perils of the sea or lakes, the underwriters do not insure against the negligence of the master and mariners as a distinct cause of loss; and where such negligence is the sole procuring cause of the loss, they are not liable.

Accordingly, where a collision happened between the insured vessel and another, by which the latter sustained damages, and her owners filed a libel against the insured vessel, alleging that the collision was occasioned by the negligence of her master and crew, and after interposition of claim and defense by her owners and notice to the insurers of the proceedings, she was condemned and ordered to be sold to pay such damages; *Held*, that the underwriters were not liable to the owners of the insured vessel for the amount of such damages which they were compelled to pay to prevent her being sold.

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Mathews *against* The Howard Insurance Co.

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APPEAL from a judgment of the supreme court sitting in the seventh district.

The complaint was upon a policy of insurance dated May 1, 1848, by which the defendants insured one Alexander Kelsey for whom it might concern, for ten thousand dollars upon the steam propeller Ontario, valued at twenty thousand dollars, for one year from the 20th April, 1848; to run upon the lakes and the river St. Lawrence. The perils insured against were those "of the lakes, rivers, canals, fires, jettisons, damage to the said vessel, or any part thereof." The plaintiffs made title to the policy by assignment from Kelsey with the assent of the defendants. The complaint proceeded to state that the Ontario being in good order and well and sufficiently manned and supplied, started from the port of Oswego in the latter part of October, 1848, bound for Chicago; and in the prosecution of her voyage, on the 5th of November following, while steering across Lake Huron, in her regular and proper track, &c. she came in contact with the barque Utica, whereof H. R. Payson and G. A. Robb claimed to be the owners; that Payson and Robb, in March, 1849, libeled the propeller in the district court of the United States, alleging that they were the owners of the barque, and that on the preceding 5th day of November, the propeller "with great force and violence ran foul of and against and struck the said barque Utica athwart her bows, and started her stem and carried away her cutwater and all her head gear, and started her breast-hooks, and otherwise greatly damaged and injured said barque, and *alleging that the same was occasioned by the carelessness and negligence of the master and crew of the said propeller;*" that the libel claimed damage for the expense of repairs and the loss of the use of the barque to the amount of \$1300; that it prayed process against the propeller and all persons claiming title to or an interest therein, and that the court would pronounce for the damage and condemn the propeller and all persons intervening for their interest in costs; that such process was issued and served, and the propeller seized by the marshal; that the plaintiffs in this action intervened for their interest in the said

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*Mathews against The Howard Insurance Co.*

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propeller, and put in their claim, answer and plea to the libel, denying the statements therein and setting up that the collision was caused by the negligence of the officers and crew of the barque, without any fault on the part of those having charge of the propeller. The complaint also alleged that the plaintiffs gave notice to the defendants of this proceeding in admiralty, and invited them to unite in the defense, and that at the July term of the district court held at Chicago in 1849, the cause was brought to a hearing and argument, when it was ordered that the testimony should be referred to a commissioner to report the amount of damages to the barque, who reported them at \$1290,91; upon which the court pronounced a decree or sentence that the libelants should recover against the propeller \$791,91 for damages, and \$328,45 costs; that the propeller, her tackle, &c. should be sold by the marshal, who was to execute a bill of sale to the purchaser, and bring the proceeds into court. That Mathews, one of the claimants, appealed, but the appeal was dismissed; and he then on behalf of the plaintiffs in this action paid the amount decreed with costs and interest, and their own costs to the amount of \$193,38, all of which they claimed to recover against the defendants, alleging that they had made proof of the collision, and of their interest in the subject insured.

The defendants demurred, for that the complaint did not state facts sufficient to constitute a cause of action, in this, that the loss did not arise from any of the perils insured against.

The court below gave judgment for the plaintiffs, which was affirmed at a general term.

For the decision of the supreme court, see 13 *Barbour*, 234.

*Henry E. Davies*, for appellant. I. The losses for which the insurers are liable are only those suffered by the property insured; this liability does not extend to all such losses, but only to such as are caused by certain specific causes, denominated *perils*, or *sea risks*. (2 *Arnold on Insurance*, 801; *Cullen v. Butler*, 5 *M. & Selw.* 461; *Taylor v. Curtis*, 6 *Trant.* 308.)

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Mathews *against* The Howard Insurance Co.

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II. It is an undisputed principle in the law of insurance that the underwriter is never responsible, unless the *proximate cause* of the loss was a peril insured against. (2 *Arnold on Ins.* 764, 798; 3 *Kent's Com.* 302, 7th ed. 374.)

III. Conceding that a loss by collision is a *peril* insured against, it is answered that the collision in this case did no damage to the Ontario. When the collision happened there was no loss, and proof of collision merely in the proceeding in the United States court did not make even a *prima facie* case of liability against her. The *cause* of the loss, therefore, was the *negligence* of the master and crew of the Ontario; this gave the libelants their right of recovery against her in the U. S. court.

IV. There is no decided case, nor any elementary writer of any authority, which lays down the rule that the underwriters on a policy like the one in this case are liable for a loss caused by the negligence of the master or crew. The contrary has been repeatedly affirmed. (*Tail v. Zeb*, 14 *East*, 481; *The American Ins. Co. v. Insley*, 7 *Barr* 229; 2 *Arnold on Ins.* 805; and see *authorities below*.) The general rule formerly was that if such negligence contributed directly to the loss, the underwriters were not liable; and the widest departures that have taken place from this rule are cases which have held (1) that where the policy insures against *barratry* it shall be held to include the lesser wrong of *negligence*; (2) that when carelessness is but the remote and contributing cause, and the *efficient and proximate cause* is a peril specifically insured against by name, the underwriters are not discharged. It is believed no case has established a broader liability. (*Rush v. The Royal Ex. Ass. Co.* 2 *Barn. & Ald.* 73; *Patapsco Ins. Co. v. Coulter*, 3 *Pet.* 222; *Columbia Ins. Co. v. Lawrence*, 10 *Pet.* 497, 517; *Amer. Ins. Co. v. Bryan*, 26 *Wend.* 563, 581; *De Vaux v. Salvador*, 4 *Ad. & El.* 420; *Fulton v. The Lancaster Ins. Co.* 7 *Ohio R.* 2; *Grim v. The Phenix Ins. Co.*, 13 *John.* 451; *Coolidge v. The New-York Fire Ins. Co.* 14 *id.* 808, 816; 1 *Camp.* 434; 2 *Arnold on Ins.* 774, 805;

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*Emerigon on Ins. (by Meredith,)* 329; *General Mutual Ins. Co. v. Sherwood*, 14 *Barnard*, 351.)

V. But in this state a much more limited rule of liability, than is required to sustain this defense, has long been established. (*Grim v. Phenix Ins. Co.*, 18 *John*. 451; *Coolidge v. N. Y. Ins. Co.*, 14 *id.* 308, 316; *American Ins. Co. v. Bryan*, 26 *Wend.* 563, 581; *Waters v. Merchants' L. Ins. Co.*, 11 *Peters*, 219.)

*Selah Mathews*, for respondents. I. A loss arising from a collision is a loss by a peril of the lakes and within the terms of the policy upon which this action is founded. (1 *Phil. on Ins.* 2d ed. 636. *Smith v. Scott*, 4 *Taunt.* 126.)

II. When the immediate or proximate cause of the loss is a peril insured against, it is no objection to a recovery against the underwriter, that the loss was remotely caused by the fault or negligence of the master and crew of the vessel insured. This is the doctrine of the supreme court of the United States. (*Patapsco Ins. Co. v. Coulter*, 3 *Peters*, 222; *Columbia Ins. Co. v. Lawrence*, 10 *id.* 507; *Waters v. Merchants' Ins. Co.*, 11 *id.* 313; *Hazard v. New Eng. Ins. Co.*, 8 *id.* 558.) It is also the doctrine of the English courts. (*Rush v. Royal Ins. Co.*, 2 *Barn. & Ald.* 73; *Walker v. Maitland*, 5 *id.* 171; *Dixon v. Sadler*, 5 *Mees. & Welsb.* 405; *S. C. in error*, 8 *id.* 895; *Bishop v. Pentland*, 7 *Barn. & Cress.* 219; *Holdsworth v. Wise*, *id.* 794, note a; *Redman v. Wilson*, 14 *Mees. & Welsb.* 476.) And the supreme court of Massachusetts. (*Copeland v. New Eng. Ins. Co.*, 2 *Met.* 432, 452.) And the same court in Louisiana. (*Henderson v. Western Mar. Ins. Co.*, 10 *Rob.* 164.) And of the same court in Ohio. (*Perrin v. Protec. Ins. Co.*, 11 *Ohio R.* 147; *overruling the case in* 5 *Ohio R.* 433.) This is also the rule in Maryland. (*Georgia Ins. Co. v. Dawson*, 2 *Gill*, 365.) And in Pennsylvania. (*American Ins. Co. v. Insley*, 7 *Barr*, 223.) It may now be regarded as the settled law in New-York also, notwithstanding the case of *Grim v. The Phenix Ins. Co.*, (18 *John*.

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*Mathews against The Howard Insurance Co.*

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451.) See *Gates v. Madison Ins. Co.* (1 *Seld.* 449, 478;) *Bolton v. Am. Ins. Co.*, (3 *Kent's Com.* 300, note a;) 3 *Hill*, 253; 3 *Kent's Com.* 306, 7.

III. The immediate or proximate cause of the loss in the present case was the collision. The collision created a lien or charge upon the plaintiff's vessel, and for which she was seized and condemned. The plaintiffs were compelled to pay the sum claimed in this action, in discharge of the lien, and to protect the vessel from a sale. (*Peters v. Warren Ins. Co.* 14 *Peters*, 99; *Hale v. Washington Ins. Co.* 2 *Story*, 176; *Sherwood v. Gen. Mutual Ins. Co.* 1 *Blatch. C. C. R.* 251; *Nelson v. Suffolk Ins. Co. in sup. court of Mass.*)

DENIO, J. I find no difficulty in agreeing with the court below, in so much of its judgment as decides that insurers are liable where a loss of the subject insured has happened in consequence of any of the perils expressly insured against, though it should appear that the negligence of the master and mariners was the remote cause of the property being brought within that peril. Although the supreme court, at an early day, held a contrary doctrine in the case of *Grim v. The Phenix Ins. Co.* (13 *John.* 451,) it has not been followed by the federal courts, or even in the courts of this state; and in the English courts there is now a settled course of adjudication the other way, and in conformity with the principle contended for by the plaintiffs. The most prominent of the cases, aside from those in this state, are referred to by Jewett, J. in *Gates v. The Madison County Insurance Co.* (1 *Seld.* 478,) and need not be repeated. That case itself is a direct authority upon the point, and being the judgment of the highest appellate court in the state, is necessarily conclusive upon the question. It was an action upon an inland fire policy, and one of the grounds of defense relied upon was that the fire happened in consequence of the culpable negligence of the servants of the assured. It was held that this was not an answer to the action, and the decision was not placed upon the ground of any distinction between a marine and a fire

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*Mathews against The Howard Insurance Co.*

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policy. It was said in the opinion of the court to be a rule well established, not only in the English but in the general American insurance law, that in the absence of fraud, the proximate cause of the loss, only, was to be looked to, and that the rule was equally applicable to marine and to fire insurance; and the greater number of the cases cited to prove the rule, were cases of insurance upon vessels. The negligence of servants in the case of a fire was considered as a cause of the loss remote from the fire which was the direct and immediate cause.

But although in a case where the vessel is brought within the peril mentioned in the policy by means of the negligence of the master and mariners, the insurers are nevertheless liable, it is not one of the terms of the contract that the insurers shall indemnify the assured against the delinquency of the servants and agents of the latter, and such is not, in general, construed to be its effect. The rule of law that the misfeasance and non-feasance of a servant are imputable to the party whose servant he is, and in whose business he was at the time acting, holds in insurance cases as well as in other legal controversies, and a number of cases have been decided in accordance with that rule. Thus, where a vessel is injured by a peril of the sea, and further damages arise from a neglect of the master to cause her to be repaired, when that was practicable; where a vessel had been stranded which rendered her liable to be injured by worms, and such injury occurred in consequence of a neglect of her master to repair; where in the case of an insurance upon cargo, the ship was lost and the goods saved, but the master neglected to tranship them as he might have done, and thus have prevented a portion of the loss; where a neutral vessel was condemned for resisting an attempt to search; where loss occurred in consequence of the master exhibiting a false bill of health, or leaving the ship's register on shore; in all these cases the insurers were held to be discharged upon the principle which has been mentioned. (*Copeland v. The N. E. Marine Ins. Co.*, 2 Metc. 432; *Hazard v. The Same*, 1 Law R. 218; *Schieffelin v. N. Y. Ins. Co.*, 9 John. 21; *Amer. Ins. Co. v.*

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*Mathews against The Howard Insurance Co.*

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*Centre*, 4 *Wend.* 45 ; *S. C.* 7 *Cowen* 564 ; *McGaw v. Ocean Ins. Co.*, 28 *Pick.* 405 ; *Cleveland v. Union Ins. Co.*, 8 *Mass.* 308.) So far as the case of *Grim v. The Phoenix Ins. Co.* holds that the underwriters are not generally liable for the misconduct of the master and crew, where there is no express stipulation to that effect, it is still an authority in this state. It is correctly said in that case that the master and mariners are not the agents and servants of the underwriters, so as to warrant the application of the general rules of law in such cases. The error into which the court fell was overlooking the consideration that the loss happened from one of the perils expressly mentioned in the policy, as its direct and proximate cause, and that where such is the case, the courts do not look further to ascertain what occasioned the happening of that cause of loss. The loss is within the very terms of the contract, and the rule of law which forbids further speculation as to the remote cause fixes the liability of the insurers. It should be kept steadily in mind that the underwriters do not undertake for the good conduct, skill, discretion or prudence of the master and crew, except in the case of an insurance against barratry, and that where they are held responsible for a loss happening on account of the failure of the exercise of those qualities on the part of those agents of the owner, it is in pursuance of the terms of the contract, which as construed by the courts, renders them liable for a loss from a peril insured against, whatever may have been the cause which occasioned the ship to encounter that peril. Suppose a class of sea risks to be excepted from the policy : should the vessel be lost by encountering one of these risks, no one would consider the insurers liable, though it should be shown that the carelessness of the master was the sole efficient and procuring cause ; and this consideration demonstrates that the underwriters do not contract for the care and skill of the crew, as a distinct hazard from which accidents may be expected. Such a contract if made, in terms, would be opposed to sound policy, as tending to encourage a relaxation of that degree of attention and vigilance so necessary at sea, and which



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might be expected to follow from a knowledge on the part of the master and mariners, that their immediate employers would be protected against the consequences of their inattention. It was this consideration which led Lord Mansfield, in passing upon a case where *barratry* was insured against, to express his surprise that such a hazard should ever have been inserted in contracts of insurance—and still more that it should have continued in them so long; for thereby, he said, “the underwriter insures the conduct of the captain (whom he does not appoint and cannot dismiss,) to the owner who can do either.” (1 *Term Rep.* 330.)

In applying these principles to the case under review, the inquiry presents itself as to the cause of the loss which the plaintiffs have sustained. We find in the first place that the district court of the United States adjudged that a lien for a sum of money attached to the plaintiffs' steamer, and ordered her to be sold unless it should be paid, and that the plaintiffs were obliged to pay it to redeem their vessel. This was in one sense the cause of the loss; but the judgment of a court proceeding according to the law of the land cannot legally be considered a peril of any kind. Again, the judgment was for a cause of action which accrued on account of a collision with the propeller, which was insured by the defendants, and collisions are classed among sea risks; but the fact that the barque was injured by the collision was not of itself the ground of the judgment. If the crew of the barque had been alone in fault, or if it had been the result of accident without blame on either side, no judgment could have passed in the district court against the propeller. It would have been *damnum sine injuria*, out of which no cause of prosecution could have arisen against the insured vessel. It was the negligence of the master and crew which furnished the basis of the proceeding and the aliment for the judgment. Without that feature the collision, and the injury to the barque would have been harmless as it regards the propeller, whatever damage the barque might have suffered. It was that feature alone which shifted the misfortune from the owners of the

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*Mathews against The Howard Insurance Co.*

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barque, with which the defendants had nothing to do, to the owners of the propeller which they had insured. All this is very different where the insured vessel is itself injured by a collision or other marine accident, resulting from the negligence of her own crew. The damage is the direct and immediate consequence of the collision, and it arises equally whether the crew had been vigilant or careless. The assured has only to prove the collision and the damage and his case is made out, and the defendants cannot shield themselves by going back to the cause of the collision. But in a case like the present, where the insured vessel sustained no damage by the contact, proof of the collision and of damage to another vessel shows nothing which will sustain an action. The plaintiff must go further and establish the fault of his own servants, and that such fault has been productive of a lien, obtained through proceedings *in rem* in the admiralty courts. I think therefore that the reasoning concerning remote and proximate causes of loss and damage is inapplicable to this case; for I regard the negligence of the plaintiffs' servants as the sole efficient cause of the loss which he has sustained. The winds, the waves and the collision are instrumentalities through which the wrong of the crew became fruitful in a loss to the vessel which they had in charge. They do not, I think, stand in the relation of cause and effect. Suppose a building insured by a fire policy to be set on fire and consumed by the negligent conduct of the servants of the assured. The insurers we have seen are nevertheless liable. Now suppose an adjoining building not insured has taken fire from the insured one and is also burned down. Although the master of these servants would be liable to the owner of the uninsured property, who might have a recovery against him for the damage, yet no one would pretend that the former could recover such loss against the insurers. The case I admit would lack one feature which exists in this case, the lien upon the property insured, still it exemplifies the incongruity of enabling one to sustain an action founded upon the wrong of persons for whose conduct he is responsible.

I think, moreover, that the point has been settled upon

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authority to which we ought to defer. The question has never arisen in the courts of this state. When this case was decided by the supreme court, there was a precedent in favor of the plaintiffs in the circuit court of the United States. (*Hale v. The Washington Ins. Co.*, 2 *Story's R.* 176.) Pending this appeal, a case in all its features like the one under review was determined in the supreme court of the United States adversely to the plaintiffs. (*General Mutual Ins. Co. v. Sherwood*, 14 *How.* 351.) In the able opinion delivered by Mr. Justice Curtis, and which would appear from the report to have been the unanimous opinion of the court, the case before Judge Story was overruled, and the doctrine was established that the negligence of the master and crew in such a case was the sole efficient cause of the loss, and that the insurers were not responsible. It was also held that the case of *Peters v. The Warren Ins. Co.*, (14 *Pet.* 99,) was inapplicable. In that case the insurers were held liable for a loss happening to a vessel not insured, by a collision with the one upon which the defendants were underwriters. But the collision was accidental, and the loss was visited upon the insured vessel and her owners by the peculiar laws of a foreign country within whose jurisdiction the accident happened. The decision was diametrically opposed to a judgment of the K. B. in a precisely similar case. (*De Vaux v. Salvador*, 4 *Ad. & El.* 420; 31 *Eng. Com. Law*, 104.) We are not called upon to pronounce upon these conflicting decisions. It is sufficient to say that if the case in 14th *Peters* sustains the judgment under review, and so far as it sustains it, it is overruled by the subsequent decision of the same court just referred to. There are strong reasons why we ought to follow the supreme court of the United States in this case. In a large class of cases it has concurrent jurisdiction upon questions of insurance with the appellate courts of all the states, and it is of great importance that the decisions upon such questions should be uniform. From the commercial and financial prominence of the city of New-York, it is to be expected that many such controversies will have their origin there in which citizens of other states will be interested parties, and

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it would be unfortunate if a different rule prevailed in our tribunals from the one which obtains in the federal courts. It is only necessary to add that the opinion delivered by Mr. Justice Curtis appears to be sustained by the continental writers on the law of marine insurance, as will be seen by examining the treatises to which he has referred, and as will also be seen by a reference to the opinion of Judge Story in the case of *Hale v. The Washington Insurance Company*.

I am of opinion that the judgment of the supreme court should be reversed, and that judgment should be given for the defendants.

PARKER, J. It cannot be successfully questioned that a loss arising from collision is a loss by peril of the lakes and within the terms of the policy. (*Phil. on Ins.* 636; *Smith v. Scott*, 4 Taunt. 126; *Peters v. The Warren Ins. Co.*, 14 Peters, 99; *Hale v. Wash. Ins. Co.*, 2 Story's R. 176.)

The insurance was upon "the body, tackle, apparel and other furniture" of the Ontario. That property was not injured by the collision, but it was subjected to a lien to the extent of the injury done to the Utica, because it appeared that the collision was caused by the carelessness and negligence of the master and crew of the Ontario; and it is claimed that it is brought within the policy, because it was subjected to such lien.

The collision itself gave no lien on the Ontario to the owners of the Utica. But the fault being wholly on the part of the Ontario, the owners of the Utica had their election either to proceed in *personam* against the owners of the Ontario, or in *rem* against the property, and they chose the latter remedy.

It was held in this state, in *Grim v. The Phoenix Insurance Co.*, (13 John. 451,) where the vessel, among other risks, was insured against fire, that the insurers were not liable for loss from fire which was occasioned by the carelessness of one of the crew, not amounting to barratry. And such were the earlier decisions in Massachusetts and Ohio. (8 Mass. R. 308; 5 Ohio R. 436; 7 *id.* 2.) But in those states, and in others, that doctrine has been expressly overruled. (*Copeland v. New*

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*England Ins. Co.*, 2 *Metc. R.* 432 ; *Perrin v. Protection Ins. Co.*, 11 *Ohio, R.* 147 ; 10 *Robinson's R.* 164 ; 2 *Gill* 365 ; 7 *Barr*, 223 ; *Patapsco Ins. Co. v. Coulter*, 3 *Peters*, 222 ; *Columbia Ins. Co. v. Lawrence*, 10 *id.* 507 ; *Waters v. Merchants' Ins. Co.*, 11 *id.* 213 ; 14 *id.* 99 ; 2 *Story's R.* 176.) And the cases last cited are in accordance with the English decisions. (2 *Barn. & Ald.* 73 ; 5 *id.* 74 ; 5 *Mees. & Welsb.* 14 ; *id.* 476, 405 ; 8 *id.* 895 ; 7 *Barn. & Cress.* 219 ; *id.* 794, note a.) It is apparent that the weight of authority is against the holding, in *Grim v. The Phenix Ins. Co.*, and such is the opinion expressed by Chancellor Kent, (3 *Ken's Com.* 300, 306, 307) and though that case has never been expressly overruled in this state, it seems to have been virtually abandoned, (3 *Hill* 253 ; 1 *Selden*, 469, 478,) and I think we are bound to hold the rule to be as it was stated by Verplanck, senator, in *The Am. Ins. Co. v. Bryan* (26 *Wend.* 583) that "underwriters are not discharged from risks expressly assumed, because the losses were incurred remotely or consequently by the default of the master or mariners."

If this were therefore a case of injury caused by the collision, I should feel bound to hold that the carelessness or negligence of the master and crew would form no defense.

But the vessel insured was not injured by the collision. The other colliding vessel sustained the injury. That vessel is not covered by the policy. To charge that loss upon the owners of the Ontario, it was necessary to do more than simply to prove the collision. It was indispensable to the recovery, to show that the collision was owing to the carelessness or negligence of the master and crew of the Ontario. It is no defense as to a loss upon the property insured, that it was caused by the carelessness of the master and crew. But does the policy extend to injuries to other vessels caused by such carelessness? That is the question presented for our determination.

There are but two reported cases in this country upon this question. In *Hale v. The Wash. Ins. Co.*, (2 *Story's Rep.* 176,) and *Sherwood v. The General Mutual Ins. Co.* (1 *Blatch.*

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*C. C. R.* 251,) it was held that the policy extended to such a loss. But both these cases are overruled by the supreme court of the United States in 14 *Howard* 351, where the judgment of the circuit court in *Sherwood v. The Gen. Mutual Ins. Co.* was reversed. The whole question is there discussed with great ability by Mr. Justice Curtis, and his reasoning is conclusive to my mind against the claim. It cannot be necessary to repeat his argument. So far therefore as the United States courts are concerned, it must now be regarded as authoritatively settled that such a claim cannot be maintained, when, as in this case, the collision was chargeable solely to the carelessness or negligence of the persons in charge of the insured vessel.

On this point, there has been no reported case in the state courts of this country. It is said that just before the late decision of the supreme court of the U. S., a case had been decided by the supreme court of Massachusetts in accordance with the views expressed in 2d Story; but it has not been reported and we have not been furnished with a copy of the opinion. We have no means therefore of knowing its extent or application. Whatever they may have been, as it was no doubt based upon the two decisions of the U. S. circuit court, which have been since overruled, it can no longer have any foundation whatever as authority.

The judgment of the supreme court of the U. S. in *Sherwood v. The Mutual Ins. Co.* is in accordance with the well settled English law; (*De Vaux v. Salvador*, 4 *Ad. & El.* 420; 31 *Eng. Com. Law*, 104;) and also with the French law. The rule is thus stated by Ledru Rollin, in his *Repertoire Générale*, *Journal du Palais*, 2 vol. 17, s. 270, Assurance. "Les assureurs ne répondent pas de l'abordage occasionné par la faute du capitaine, ou de l'équipage ni de la prise arrivée, parce que le capitaine n'a pas su éviter l'ennemi, ou parce qu'il ne s'est pas suffisamment défendu, ou parce qu'il s'est volontairement écarté de l'escorte avec laquelle il devait voyager," (*citing 3 Pardessus*, No. 771 *Boulay Paty*, to. 4, p. 66.)

It is believed such is also the law in all the other maritime

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countries of Europe in which the civil law is recognized as the basis of their jurisprudence. Pothier, in his "*Traité du Contrat d'Assurance*," (§ 50,) states the rule with great clearness and precision, as follows :

"Abordages, c'est à dire lorsque mon vaisseau, que j'ai fait assurer a été endommagé par le heurt d'un autre vaisseau. L'assureur est tenu de m'indemniser du dommage arrivé a mon vaisseau par cet abordage, lorsqu'il est arrivé par un cas fortuit, comme dans une tempête ; ou même lorsqu'il est arrivé par la faute du maître d'un autre vaisseau ; Auquel cas je dois céder à l'assureur mes actions entre celui par la faute de qui est arrivé l'abordage, et contre son commettant. Mais si c'est par la faute du maître de mon vaisseau que l'abordage est arrivé, l'assureur n'en est pas tenu, s'il n'y a une clause particulière que l'assureur sera tenu de la barratiné du capitaine." (*Se also Emerigon*, 329 ; *Boucher*, 1500, 2.)

Similar opinions have been expressed by writers on insurance, in our own tongue. (1 *Phil. on Ins.* 636 ; *Marsh. on Ins.* 493 ; *Park. Mar. Ins.* 131 ; *Broom's Leg. Max.* 167.) Arnold (2 *Arn. on Ins.* 775,) says when the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, there seems little doubt that the underwriters would be thereby discharged."

It is conceded on both sides of this question, that it is governed by the maxim, (*Bac. Max. Reg.* 1,) *In jure, non remota causa, sed proxima, spectatur.* The difference of opinion arises from its application. What is the proximate cause, in this case, of the injury ? If an injury to the vessel was the immediate result of the collision, the latter would then be the proximate cause, and being within the terms of the policy the defendants would be liable. But can it be said that the collision is the proximate cause, when, of itself, it inflicts no injury, and when it is necessary to prove something more, viz. the carelessness or negligence of the master and crew, to give even a right of action ? The plaintiff establishes no right, by simply proving a collision,

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because from that alone no damage accrued. The right to damage against the owners of the Ontario, rested exclusively upon the fault of those in charge, to whose neglect the collision was solely chargeable. If that ingredient be taken away, the case is emasculated. Curtis, J. said in *The Mutual Ins. Co. v. Sherwood*, "In applying this maxim, we look for the proximate cause of the loss; if it is found to be a peril of the sea, we inquire no further. We do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion and did not in and by itself occasion the loss claimed; if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss. In such a case," said the learned judge, "the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referrible to the negligence of the master and mariners, such a loss is not covered by the policy."

In *De Vaux v. Salvador*, above cited, Lord Denman, C. J. said, "The ship is driven against another by stress of weather; the injury she sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel. And whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the court of admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the



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revenue laws of any particular state, which was rendered inevitable by perils insured against."

The plaintiff's claim seems to me to be as adverse to principle as it is unsupported by authority. If we sustain it, we shall commit, in my judgment, the great fault of establishing for our own state, a rule of law in conflict with the now settled doctrine of the highest federal court, and at variance with the often expressed judgment of the whole civilized world. Such a decision could not fail to be exceedingly embarrassing, for in no department of the law is uniformity more desirable, than in that which regulates the rights and obligations of those engaged in commercial pursuits. The law of the maritime world should be limited by no national boundaries, but should be as universal as the commerce which it protects and regulates.

I think the judgment of the supreme court should be reversed, and judgment should be given in favor of the defendant on the demurrer.

Judgment accordingly.

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OAKLEY against MORTON.

A condition precedent must be strictly performed, to entitle a party to recover. Accordingly where, by a contract under seal, O. agreed that he would keep twenty cows during the season for the dairying business, and sell the butter made from said dairy of cows to M., to be delivered at a time and place specified, at a price per pound named, and M. agreed to pay for the butter to be delivered; and O. at the commencement of the dairy season put twenty cows on his farm, from which butter was made until the end of the season, which was about the middle of November, except that three of the cows, about the first of September, and two of them about the middle of October, ceasing to yield more than about a quart of milk each per day, and to be of much value for dairy purposes, were respectively sold at those dates; HELD, that O. could not sustain an action on the contract.

By the contract O. was required to keep during the season twenty milch cows, and when any of those provided ceased to yield milk, it was his duty to procure others within a reasonable time. *Per* ALLEN and JOHNSON, Ja.

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Where a person by his contract engages to do an act, performance is not excused by an inevitable accident. *Per* ALLEN, J.

Under an averment of performance of a covenant, evidence in excuse for non-performance is not admissible. *Per* ALLEN, J.

APPEAL from a judgment of the supreme court sitting in the sixth district. The action was covenant, commenced in 1847, upon a contract executed by the parties under seal and dated the 28th of February, 1846, in which it was recited that Oakley, the plaintiff, had bought a farm in Marathon, Courtland county, and was to take possession of the same the ensuing spring, and by which he agreed "*that he would keep twenty cows or more during the [then] coming season for the dairying business, and that he would sell the butter made from said dairy of cows to Morton, the defendant, well packed in good firkins, for the sum of fifteen cents per pound, to be delivered to him at the village of Chenango Forks, Chenango county, on the canal, at such time or times as Morton should request, between the first days of October and December then next; the butter to be of good prime quality.*" And the defendant agreed "*that he would pay said Oakley the sum as above stated for his butter, as above stated, to be delivered as before mentioned, the payment or payments to be made by him at the time of receiving the butter.*"

The plaintiff in each count of his declaration averred that "he did keep a large number of cows, to wit, twenty cows, during the season next ensuing the date of said agreement for the dairying business;" that he packed the butter made from said cows during the season, as required by the contract; that pursuant to the direction of the defendant, contained in letters received from him dated the 26th of October, and the 2d of November, 1846, he on the 15th of said November delivered the butter into the charge and custody of one Edward More AT GREEN, Chenango county, on the canal.

The defendant by special plea denied all the material allegations of the complaint except the execution of the contract. The cause was tried before the Hon. Ira Harris, one of the justices of the supreme court, at the Cortland circuit.

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On the trial it was proved that the dairying season commences in the spring when there is sufficient grass for cows, and continues till the pastures fail, which is ordinarily about the middle of November, and in 1846 was from the 10th to the 25th of November. That the plaintiff put 20 cows on his farm in the spring of 1846, and at no time had a greater number in his dairy that season. That about the middle of August he sold five of these cows to one Helsinger, to be delivered to him when they ceased to give milk, which it was then stated would be the first of September as to three of them, and the first of October as to the other two, and that the three were taken away by Helsinger not later than the 5th of September, and the two as early as the middle of October; that these cows were not worth much for dairying, and gave only about a quart of milk each per day when delivered to Helsinger; that Helsinger milked the three every other day for six or eight days after he took them, and got from them about six quarts of milk at each milking. The plaintiff did not supply the place of these five cows. The counsel for the defendant, in due season, objected to the evidence tending to prove that the five cows sold had ceased to give milk when delivered to Helsinger, which evidence was allowed and the defendant excepted. The counsel for the defendant offered to prove that these five cows were farrow cows in the spring; this evidence was objected to and excluded, and the defendant excepted.

The defendant resided at Stamford, Delaware county.

The plaintiff's counsel read in evidence a letter and postscript thereto, written by the defendant, addressed and sent to the plaintiff by mail, and postmarked Stamford, N. Y. November 8, as follows:

*"Stamford, October 26th, 1846.*

Brother Oakley: I received yours by the hand of Mr. More, and in answer to it I am sorry to say to you that circumstances are such that I am entirely unable to leave to come out to your place. As regards the butter, I wish you to deliver it to the canal per contract. Give Mr. More the charge of it, to sell and pay over to you, and if it falls short the contract I am

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*ready to make up the balance as soon as informed of it.* I suppose Mr. More you would consider perfectly safe in taking charge of it, and if it is as good quality as contract it will not fall much short of 15. But be it as it may I want you to let him take it and do the best he can with it, for I have got myself into a job to raise \$500 for a villain Jack Reynolds on the 15th of next month or do worse by signing at the bank for him and you must conclude of course that it would be impossible for me to fetch you the            as talked of, but probably it will not make much difference with you a week or two. Mr. More said he would call on his return. If so I shall see him, if not you had better send it down by him, and if it make any great difference with you I will satisfy you. All well.

Yours with respect.

LEWIS MORTON.

Nov. 2d, 1846.

P. S. Friend Oakley: I have delayed sending this on the account that I expected Mr. More to return here on last Friday and thereby would be more fully prepared as to what course would be best. But as Mr. More did not call, I wish you would see him and let him take charge of the butter when he goes down and he may pay over the money to you, and if it falls short the contract with you and his commission, &c. I will see it all settled when you come out. If Mr. More should not be there and you should not know of any way to forward it to him at New-York, and if there should be any one that would be competent to take charge of it, or if you could sell it on the spot per contract, I wish you to do so and oblige your most sincere friend,

LEWIS MORTON."

Edward More testified that in the fall of 1846 he resided in Marathon, and was engaged in buying butter, and that his son, John S. More, was then engaged as a commission merchant selling butter in New-York; that in October, 1846, on his way to New-York, he carried a letter from the plaintiff to defendant at Stamford; that he returned to Marathon in November, and that a day or two after his return plaintiff stated to him that he had received a letter from defendant, who wrote that he desired him,

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More, to take charge of the butter, and that he, plaintiff, wished him to take it and sell it, doing as well with it as he could; to take and do with it as his own; that he told the plaintiff he was not going to New-York soon, and plaintiff asked him to whom he had better send it; witness told him to John S. More, Vesey-st. New-York; that the plaintiff asked witness where on the canal he delivered his butter, and witness told him some at Chenango Forks and some at Green; that Lewis & Gilman at Green were safe men to freight the butter with to New-York; that witness freighted his butter with them; that nothing was said as to whether the plaintiff's butter should be sold for cash or on time, or as to what should be done with its proceeds.

It was proved that the plaintiff, on the 11th of November, delivered his butter at Green, on the canal, to Lewis & Gilman, and took from them the following receipt, viz. "Received in store for G. L. Oakley, 24 firkins of butter to ship to John S. More, 73 Vesey-st. New-York. Green, November, 1846. Lewis & Gilman;" that on his return from Green he delivered this receipt to Edward More; that the butter was received in New-York by J. S. More, on the 3d of December; that it came to him distinct from his father's and with a separate freight bill; that he paid the freight upon it, and sold it the day after it was received, at 16½ cents per pound; that John S. More received no instructions as to this butter except a letter from his father, Edward More, saying it was an excellent lot of butter and wishing him to do as well with it as he could.

The defendant offered to prove that the butter was sold by J. S. More on credit, that the purchaser absconded and its price was lost; this was objected to and excluded and defendant excepted. The counsel for the defendant moved the court to nonsuit the plaintiff; and on such motion, and again at the close of the evidence insisted among other things, that it was a condition precedent that the plaintiff should keep at least twenty cows during the season for the dairying business, and deliver the butter made from this number; and that he had not performed this covenant on his part and could not recover. The said justice

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denied the motion for a nonsuit, and ruled and decided as *matter of law*, that the sale of the five cows by the plaintiff and the keeping of only seventeen cows after the forepart of September, and only fifteen after the middle of October, was not a breach of the covenant or failure to perform on his part, inasmuch as the cows when sold had nearly ceased to yield milk, and were therefore useless for dairying purposes; and ordered a verdict in favor of the plaintiff for the butter at the contract price. To which ruling and decision the counsel for the defendant excepted. The defendant moved for a new trial on a bill of exceptions, which was refused, and judgment rendered for plaintiff. The defendant appealed to this court.

*Samuel Beardsley*, for the appellant.

*H. Ballard*, for the respondent.

W. F. ALLEN, J. The right of action of the plaintiff depended upon the performance by him of a condition precedent, to wit, the keeping of at least twenty cows for the dairying business during the season of 1846, and delivering the butter made therefrom to the defendant at the time and place specified in the agreement. The plaintiff was bound to aver and prove a fulfilment of such condition or some excuse for the non-performance; and if an excuse was relied upon, he should have averred his readiness to perform, and the particular circumstances which constituted such excuse. (1 *Chit. Pl. Springf. ed. of 1844*, 321, 326.)

A performance of the condition precedent having been voluntarily assumed by the plaintiff, could only be dispensed with or prevented by the opposite party; and would not be excused, although it had become impossible without any default on the part of the plaintiff. (*Carpenter v. Stevens*, 12 *Wend.* 589; *Moakley v. Riggs*, 19 *John.* 69.)

Whenever a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may,

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notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. (*Aleyn*, 27; *Pr. Ld. Ellenborough in Atkinson v. Ritcher*, 10 East, 530; *Com. Dig. Action upon the Case upon Assumpsit, G.*; *Id. Condition D.* 1; 6 *Petersd. Abr.* 216; *Shubrick v. Salmon*, 3 Burr. 1637; *Barker v. Hodgson*, 3 M. S. 267; *The Com. of Brecknock v. Pritchard*, 6 T. R. 750.) The plaintiff has sought to entitle himself to recover, by averring that he did keep a large number, to wit, twenty cows for the dairying business during the season of 1846, and the court below have decided that this averment was sustained by the evidence. The proof was, that the dairying season commences in April and ends during the month of November, and when cows begin feeding on hay; that the plaintiff in the spring put twenty cows on his farm, three of which became dry about the first of September, and two others from the first to the fifteenth of October. The five were disposed of and their places were not supplied. The quantity of butter of course depended upon the number of cows from which it was made, and there was evidence offered to show that the value in market of butter made from a dairy of twenty cows was greater than that made from fifteen cows.

It will be observed that the covenant of the plaintiff does not refer to any particular cows; but is to the effect that he will keep twenty or more; that is, at least twenty cows for dairying business; and in this he covenants that they shall be reasonably suitable for dairy purposes, that is, milch cows, and when they ceased to give milk they were no longer within the condition of the contract. The covenant was coextensive with the season, and a failure to perform it at the latter part of the season was as much a violation of its letter and spirit as would have been a failure in the earlier part. The agreement was to keep the entire number during the entire season, and a strict performance was a condition precedent to his right to recover of the defendant, who could not be compelled to receive and pay for the butter made from any less number of cows. (*Page v. Ott*, 5 Denio, 406; *Smith v. Briggs*, 3 id. 73.) Had the party de-

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sired to protect himself against the contingency of the failure of any of the twenty cows which he should procure, or his inability to supply the places of any that should die or cease to be suitable for dairy purposes before the close of the season, or his inability to supply pasturage for so large a number, and still hold the defendant to the performance of his part of the contract, he should have made provision for it in the agreement.

Having undertaken to keep the complement of twenty cows during the season, it was his duty in the first instance to provide such as would probably answer the purposes of the contract, and if any by an unforeseen contingency should fail or die, to supply their places within a reasonable time. A keeping of twenty cows for three months and fifteen for the next three months, is not literally or substantially keeping the first number for the whole six months. The contract cannot be otherwise construed than if the defendant had undertaken to pay a gross sum for the butter to be made from a given number of cows, and under such a contract it would not be claimed that the dairyman could provide the whole number of cows, of such as would become dry in the midst of the season, and still compel a performance by the defendant. This case is in principle somewhat like *Beatson v. Schank*, (8 *East*, 233,) in which it was held that the party who took upon himself to keep on his vessel a certain number of hands, was bound to provide against the contingency of any of them dying, as by taking an extra number on board. (See also *Inman v. Western Fire Ins. Co.*, 12 *Wend.* 452.)

The plaintiff in this case, by the exercise of proper care in making his purchases in the spring, could have guarded against the contingency which eventually deprived the defendant of the butter to which he was entitled; and if he preferred such cows as would give milk a part of the season and then make beef in the fall, and the consequence has been that he has been unable to perform his contract with the defendant, he has sustained no injury, and no action will lie against the defendant.

In *Pike v. Butler*, (4 *Comst.* 360,) which was a suit in equity, the equities of the plaintiff were much stronger than in



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this case, and yet the court held that he was not entitled to any relief, and dismissed his bill with costs.

The plaintiff did not prove a substantial performance of this part of the contract, and the performance was not dispensed with or prevented by the defendant. The evidence did not tend to establish an excuse for non-performance, even if under the pleadings, an excuse could have been shown. Upon the merits, therefore, and upon all the evidence the motion for a nonsuit should have been granted. But under an averment of performance as in this case, evidence in excuse of non-performance was not admissible and should have been excluded. (*Crandall v. Clark*, 7 Barb. 169; *Baldwin v. Munn*, 2 Wend. 399; *Phillips v. Rose*, 8 John. 392; *Freeman v. Adams*, 9 id. 115; *Fleming v. Gilbert*, 3 id. 528; *Little v. Holland*, 3 T. R. 590; 1 Ch. Pl. 321, 326.)

This point is fatal to the plaintiff, and renders it unnecessary to examine the other questions made on the trial.

The judgment of the supreme court should be reversed, and a new trial ordered, costs to abide the event.

JOHNSON, J. If the decision of the justice was correct it will follow, that if half of the twenty cows had died in the middle of the season, the defendant would still have been bound to receive and pay for the butter of the remaining ten. I think the decision is in direct conflict with the terms of the contract of the parties. The plaintiff's undertaking was that he would keep twenty cows or more during the season; not that he would stock his farm with twenty cows at the commencement of the season. The contract related to the making of butter from the milk of the cows so kept, and the covenants are to be interpreted with reference to the purpose for which the cows were to be kept. I do not think that the plaintiff could have satisfied the requirements of the contract by putting on twenty cows, ten of which were dry, and for the same reason I do not think that the risk of the drying up of the cows during the season was upon the defendant. This latter question is, however,

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hardly involved in the case, for the plaintiff parted with the cows before they were actually dried up. It is true that the milk which was afterwards procured from them was of small amount, but upon a question of the performance of a condition precedent small matters are of consequence. The performance must be exact, not *cy pres*. Besides, if the law says that six quarts of milk every other day for six or eight days, are not enough to be regarded upon such a question, I am considerably at a loss to know, where in the law is to be found the precise measure of milk which a cow may yield, and yet under such a contract be disposed of without a violation of it. Another consideration seems to me to strengthen this view of the contract; the plaintiff was not bound to keep the same cows during the whole season, on the contrary, he was at liberty to change them at his pleasure, and according to his own views of his own interest. All the defendant stipulates for, is the butter from the milk of twenty cows during the season. Now if the risk of the drying up of the cows is on the defendant, it would attach from time to time to each cow the plaintiff might choose to substitute for those with which he originally stocked his farm. That such a consequence is involved in the construction put upon the contract at the trial, seems to me to show it to be an unreasonable construction, and one which ought not to be sustained. The obligation of the plaintiff under this contract was, as I conceive, to keep at least twenty cows yielding milk during the dairying season, and as he has failed to comply with this obligation, he should, in my opinion, have been nonsuited.

GARDINER, Ch. J., RUGGLES, PARKER and EDWARDS, Js. concurred.

DENIO, J. was in favor of affirming the judgment of the supreme court, on the ground that the defendant, by his letter of the 26th of October, written near the close of the dairy season, gave the plaintiff explicit and peremptory directions what to do with the butter made under the contract, and thereby waived performance of the condition precedent. That in the absence

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*Andrews against Durant.*

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of proof to the contrary, it should be presumed he was informed of the true state of facts when he gave these directions, especially as in his letter he acknowledged the receipt of one from the plaintiff on the subject of the butter, which was not given in evidence.

Judgment reversed and a new trial ordered.

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ANDREWS and others *against* DURANT and others.

The general rule is, that under a contract for the building of a vessel or other thing, no property vests in the person for whom it is agreed to be built until it is finished and delivered.

The rule is the same, where certain portions of the contract price are agreed to be and are paid to the builder at specified stages of the work, and where an agent of the person for whom the article is to be constructed, is to and does superintend and approve the materials and work.

Therefore where A. contracted to build for B. a vessel of specified dimensions, and deliver it to him complete on a day named, for the price of \$5000; \$3000. to be paid at specified stages of the work, and \$2000 when it was completed and delivered, the workmanship and materials to be inspected and approved as the work progressed, by the superintendent of B., which was done; *Held*, that B. had no property in the vessel before it was completed.

APPEAL from a judgment of the general term of the supreme court held in Albany county. The plaintiffs brought an action in the nature of trover for a barge in an unfinished state, which they alleged the defendants had converted to their own use. The defendants denied the allegations in the complaint, and set up title to the barge in themselves. The cause was tried before the Hon. M. Watson, a justice of the supreme court, in April, 1850, without a jury. The following facts appeared on the trial. On the 24th April, 1849, the defendants entered into a contract, in writing, with William H. Bridger & Co., ship-builders, by which the latter agreed "to build" for the defendants, for the sum of \$5000, a barge of certain dimensions and with a certain


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size and description of timbers, &c. which were particularly specified, except the *rail*, which was to be "according to direction of superintendent." The further provisions of the contract were as follows: "All the materials to be furnished by the builder, and all to be of the first quality, and the work subject to the superintendent, who shall have the privilege of rejecting any timber he may think is not suitable, and object to any work not done in a workmanlike manner. The model of the boat to be made like barge I. L. Brown. The boat to be furnished complete, and ready for the ship chandler according to the above specification on the first day of August next, and delivered to Durant, Lathrop & Co. [the defendants] at Kingston. In case the barge is not complete by the time specified above, or within ten days of that time, W. H. Bridger & Co. agree to forfeit two hundred and fifty dollars for every week's delay. *Payment*: The said five thousand dollars to be paid as follows, viz. one thousand dollars when keel is laid—one thousand dollars when frame is up—one thousand dollars when planked and calked, and two thousand dollars when completed and delivered."

Bridger & Co. proceeded in the construction of the barge until the 4th day of August, 1849, when, having stopped payment, they assigned the unfinished vessel with their other property, to the plaintiffs as trustees for the benefit of their creditors, according to certain classes of preference. The barge had been so far advanced in its construction as to be planked, and the defendants had paid the builders three thousand dollars according to the contract, that is to say, one thousand dollars at each of the three separate stages of the work first referred to in the contract, when the builders failed. The defendants having obtained possession of the barge, proposed to the plaintiffs to finish it, and offered in that event to pay them the balance of the contract price, but this was declined; and the plaintiffs demanded the barge of the defendants, who would not give it up. The defendants then procured it to be completed on their own account, at an expense of seven hundred dollars. The person who acted as superintendent in the building of the barge was sworn, and



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testified that he was employed exclusively by the defendants and was paid by them.

Judgment was rendered by Justice Watson in favor of the defendants, and the plaintiffs excepted: it was affirmed at the general term. The plaintiffs appealed to this court.

*N. Hill, Jun.*, for the appellants. I. The promise of Bridger & Bishop was to build and complete the barge, and deliver it at Kingston on a future day, they to find all the materials. It was therefore not a contract of *sale*, and no title vested in the defendants. (*Merritt v. Johnson*, 7 *John*. 478; *Gregory v. Stryker*, 2 *Denio*, 628; *Johnson v. Hunt*, 11 *Wend*. 139.) 1. Such a contract, until entirely executed, has uniformly been treated in this country as one for work and materials, not of sale; and the same doctrine prevailed in England until after 1822. (*See cases above cited, and also, Mucklow v. Mangles*, 1 *Taunt*. 318; *Towers v. Osborne*, 1 *Strange*, 506; *Groves v. Buck*, 3 *Maule & Selw.* 178; *Lawrence, J.* 2 *Taunt*. 42; *Hight v. Ripley*, 19 *Maine R.* 137; *Crookshank v. Burrill*, 18 *John*. 58; *Sewall v. Fitch*. 8 *Cowen*, 215; *Mixer v. Howarth*, 21 *Pick*. 205; *Spencer v. Cone*, 1 *Metc.* 283) 2. The idea that a provision in the contract for advances by the employer, at specific stages of the work, changes it into a contract of *sale*, is directly at war with the law as settled here for nearly half a century. (*Merritt v. Johnson*, 7 *John*. 478. *Gregory v. Stryker*, 2 *Denio*, 628; *Johnson v. Hunt*, 11 *Wend*. 139.) 3. Nor is it pretended that the provision as to a superintendent can have any such effect, the intent of it being merely to prevent disputes, and avoid the necessity of specifying the work and materials with more minuteness. (15 *Eng. Com. Law*, 218.) 4. So of the circumstance that the employer cannot be obliged to accept any other vessel than the one built of the specific materials; this being equally true of *Merritt v. Johnson*, where both parties contributed work and materials. (7 *John*. 473, 4, 5; 11 *Wend*. 139, *Savage, Ch. J.*; *Blackburn on Sales*, 158, 9, 160; 21 *Pick*. 205.)

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II. The first departure from the intelligible rule established by the above decisions was suggested in *Woods v. Russell*, (5 *Barn. & Ald.* 942;) and neither the dicta of that case, nor the decision which adopted them, should control the present, for the following reasons: (See 5 *Barn. & Ald.* 946, 7, 8; 31 *Eng. Com. Law R.* 112.) 1. These dicta were not only without precedent at the time, but against it, and were adopted with manifest reluctance; the court acknowledging its inability to reconcile them with established principles. (*Clark v. Spence*, 31 *Eng. Com. Law Rep.* 107, 111 to 114.) 2. They frustrate the more obvious intent of the parties as evinced by the terms of the contract, that being for building a vessel, to be delivered complete, at a fixed time and place; not for transferring parts of it before. (31 *Eng. Com. Law R.* 112, 113, 114.) 3. They separate the visible possession from the ownership, which is contrary to the policy of the law, as it misleads those supplying materials and labor on credit, as well as others. (7 *Durnf. & East*, 230, *Kenyon, C. J.*; 9 *John.* 243, *Kent, C. J.*) 4. The very reason and policy on which they were adopted in England, i. e. that they "had probably been acted on since by persons engaged in ship building," should insure their rejection here. (31 *Eng. Com. Law R.* 114; *Merritt v. Johnson*, 7 *John.* 473; *Johnson v. Hunt*, 11 *Wend.* 139; *Gregory v. Stryker*, 2 *Denio*, 628; 23 *Wend.* 340, *Cowen, J.*) 5. They rest upon no intelligible or satisfactory foundation, at least none which can be maintained without overruling the principle of *Johnson v. Merritt*, and the cases which have followed it. (15 *Eng. Com. Law R.* 218; *Co. Litt.* 379 b.) 6. This innovation in England resulted in a confusion of rights and in raising various perplexing questions, which have not yet been solved by the courts. (31 *Eng. Com. Law R.* 110, *note.*)

III. The parties are presumed to have contracted, in reference to the well known general rule established by *Merritt v. Johnson*, and there is no probability that they meant to adopt the exception since engrafted on it in England. (2 *How. R.* 612, *Baldwin, J.*; *Cowen & Hill's Notes*, 1456.)

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*S. H. Hammond*, for the respondents. I. We insist that the barge was the property of the respondents, from the time the keel was laid, and approved by the superintendent, and the first payment was made. 1. Because, upon no other principle can exact and equal justice be done to all parties. The purchaser inspects through his superintendent, and receives the property in its then state, and pays according to the contract, for the *particular thing thus inspected and approved*, and is protected in his payment by his title to the *specific thing for which he pays*. The builder is protected by his lien upon the property, which secures him the payment of the future instalments as they become due. 2. The respondents contracted for a particular and specific thing, and not for a barge answering a general or particular description. They paid their money, not for a barge, but for that specific barge. At each stage of the work, there was a practical delivery to, and acceptance of it by the purchaser. When the keel was laid, it was tendered as a finished keel, was accepted and paid for. When the frame was up, it was tendered as a finished frame, was accepted and paid for. When it was "planked and ceiled," it was again tendered as the frame of that same barge, planked and ceiled, was inspected, accepted and paid for. This view of the matter is in entire accordance even with the authorities cited by the learned counsel for the appellants, and is entirely consistent with the theory of the law, as he claims it to be. 3. This very identical question is as clearly settled by authority in favor of the respondents, as any question ever was or ever can be. (*Story on Sales*, p. 254-5, §§ 315, 316; *Chit. on Cont.* 5th Amer. from 3d Lond. ed. 378-9; *Long on Sales*, 288; *Woods v. Russell*, 5 Barn. & Ald. 942; *Clark v. Spence*, 4 Ad. & El. 448; *Abbot on Ship.* 5th Am. ed. 4, 5; *Maine Sup. Court, Law Reg.* vol. 1, No. 8, p. 484; *Wilkinson's Law of Shipping*, p. 27, et seq.; *Faculties' Decisions of the Court of Sessions in Scotland*, vol. 9, p. 446.) The case of *Wood v. Russell*, and that of *Clark v. Spence*, have been frequently referred to by the English courts with approbation, and as settling

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the law on the precise question involved in the case, 2 *Mees. & Welsb.* 602. The principle of those cases, as we have already shown, is recognized by every English and American elementary writer as the fixed law, and there is no case to be found either in England, or in this country, in which the court has overruled or questioned its soundness.

II. The cases cited by the appellant do not affect the question now before the court, because in none of them was the price payable by instalments at particular stages of the work, nor was the thing to be made, built or to be built under a superintendent employed and paid by the purchaser.

These cases affirm a general principle which we do not deny or seek to evade, a principle moreover which does not conflict at all with our position.

DENIO, J. In general a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. All the authorities agree in this. (*Towers v. Osborne*, 1 *Str.* 506; *Mucklow v. Mangles*, 1 *Taunt.* 318; *Johnson v. Hunt*, 11 *Wend.* 139; *Crookshank v. Burrill*, 18 *John.* 58; *Sewall v. Fitch*, 8 *Cow.* 215; *Mixer v. Howarth*, 21 *Pick.* 205.) And the law is the same though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly. In *Mucklow v. Mangles*, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built and the name of the person who contracted for it was painted on the stern, yet it was held that the title remained in the builder. In *Merritt v. Johnson*, (7 *John.* 473,) where a sloop was agreed to be built and one-third of the price was to be paid when one-third of the work was done, two-thirds when two-thirds were done, and the balance when it was completed, and before it was finished it was sold on execution against the builder after more than a third had been done



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and more than that proportion of the price had been paid, the court decided that the vessel was the property of the builder and not of the person who engaged it to be constructed.

Where during the course of the transaction the vessel or other thing agreed to be built is identified and appropriated so that the mechanic would be bound to complete and deliver that particular thing, and could not without violating his contract substitute another similar article though otherwise corresponding with the agreement, there would seem to be more reason for holding that the property was transferred; still it has never been held that this was enough to pass the title. In *Laidler v. Burlinson*, (2 Mees. & Welsb. 602,) the vessel was about one-third built when the contract was made. The builder and owners agreed to finish that particular vessel in a manner specially agreed upon for a price which was the equivalent for the finished vessel. Before it was completed the builder became bankrupt, and the possession passed into the hands of his assignee. The court of exchequer held the true construction of the contract to be that the title was to pass when the ship was completed and not before. The parties only agreed to buy a particular ship *when complete*, and although the builder could not comply with the contract by delivering another ship, still it was considered an executory contract merely. In *Atkinson v. Bell*, (8 Barn. & Cress. 277,) the same principle was held in respect to a contract for making spinning machinery, and in *Clark v. Spence*, (4 Adolph. & El. 448,) which is the case principally relied on by the defendants, it was admitted by the court that the appropriation of the particular ship to the contract, then in question, by the approval of the materials and labor by the superintendent, did not of itself vest the property in the purchaser until the whole thing contracted for had been completed.

In the case before us, it cannot be denied but that the barge, as fast as its several parts were finished with the approval of the superintendent, became specifically appropriated to the fulfilment of this contract, so that Bridger & Company could not have fulfilled their agreement with the defendants in any other

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way than by completing and delivering that identical boat. This results from the consideration that the superintendent could not be called upon to inspect and approve of the work and materials of another barge, after having performed that duty as to one; so that the contract would be broken up unless it applied itself to this vessel. But it is clear that this circumstance alone does not operate to transfer the title. The precise question in this case is whether the concurrence of both particulars—the payment of parts of the price at specified stages of the work, and the intervention of a superintendent to inspect and approve of the work and materials—produces a result which neither of them separately would effect. It is no doubt competent for the parties to agree when and upon what conditions the property in the subject of such a contract shall vest in the prospective owner. The present question is therefore simply one of construction. The inquiry is whether the parties intended by the provisions which they have inserted in their contract, that as soon as the first payment had become payable and had been paid, the property in the unfinished barge should vest in the defendants, so that thereafter it should be at their risk as to casualties, and be liable for their debts, and pass to their representatives in case of their death. Such an agreement would be lawful if made, and the doubt only, is whether the parties have so contracted.

The courts in England, under contracts in all material respects like this, have held that the title passed. In *Woods v. Russell*, (5 Barn. & Ald. 942,) the question came before the court of king's bench, and Abbot, C. J. distinctly declared his opinion that the payment of the instalments under such a contract vested the property in the ship in the party for whom it was to have been constructed. But there was another feature in the case upon which it was finally decided. The builder had signed a certificate for the purpose of enabling the other party to procure the vessel to be registered in his name and it was so registered accordingly while it was yet unfinished and before the question arose. The court held that the legal effect of signing the certificate for the purpose of procuring the registry was,

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from the time the registry was complete, to vest the general property in the party contracting to have the ship built. This case was decided in 1822, and was the first announcement of the principle upon which the defendants' counsel rely in the English courts. The case of *Clark v. Spence* was decided in 1836. It arose out of a contract for building a vessel, which contained both the features of superintendence and of payments according to specific stages of the work, as in *Woods v. Russell*, and as in the contract now before the court. The court of king's bench was clearly of opinion, that as fast as the different parts of the vessel were approved and added to the fabric they became appropriated to the purchaser *by way of contract*, and that when the last of them were so added and the vessel was thereby completed it vested in the purchaser. The court conceded that by the general rules of law, until the last of the necessary materials was added the thing contracted for was not in existence; and they said they had not been able to find any authority for holding that while the article did not exist as a whole and was incomplete, the general property in such parts of it had been from time to time constructed should vest in the purchaser, except what was said in the case of *Woods v. Russell*; and that was admitted to be a dictum merely, and not the point on which the case was decided. The court however decided upon the authority of that case, though with some hesitation, as they said, that the rights of the parties in the case before it, after the making of the first payment, were the same as if so much of the vessel as was then constructed had originally belonged to the party contracting for its construction and had been delivered by him to the builder to be added to and finished; and they said it would follow that every plank and article subsequently added would, as added, become the property of the party contracting with the builder. The dictum in *Woods v. Russell* was incidentally referred to as the law in *Atkinson v. Bell*, (8 Barn. & Cress. 277,) and the doctrine there stated, and confirmed in *Clark v. Spence*, was assumed to be correct in *Laidler v. Burlinsson* before referred to. It has also been generally adopted by systematic writers in

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treatises published or revised since the decision of *Clark v. Spence*, that case and *Woods v. Russell* being always referred to as the authority on which it rests. (*Story on Sales*, §§ 315, 316; *Chit. on Cont.* 378, 9; *Abbot on Ship.* 4, 5.)

It is scarcely necessary to say that the English cases since the revolution are not regarded as authority in our courts. Upon disputed doctrines of the common law they are entitled to respectful consideration; but where the question relates to the construction or effect of a written contract they have no greater weight than may be due to the reasons given in their support. Can it then be fairly collected from the provisions of this contract, that the title to the unfinished barge was to be transferred from the builder to the other party upon the making of the first payment, contrary to the principle well settled and generally understood that a contract for the construction of an article not in existence is executory until the thing is finished and ready for delivery? In the first place, I should say that so marked a circumstance would be stated in words of unequivocal import; and would not be left to rest upon construction, if a change of property was really intended. The provision for superintendence by the agent of the intended owner, though it serves to identify and appropriate the article as soon as its construction is commenced, does not, as we have seen, work any change of property. Such would not ordinarily be the intention to be deduced from such a circumstance. Many of the materials of which a vessel is composed are ultimately covered so as to be concealed from the eye when it is finished; and as the safety of life and property is concerned in the soundness and strength of these materials, it is but a reasonable precaution to be taken by one who engages a vessel to be constructed, to ascertain as the work progresses that every thing is staunch and durable; and such a provision, as it seems to me, does not tend to show a design that there shall be a change of property as fast as any materials or work are inspected and approved. It amounts only to an agreement that when the whole is completed the party will receive it in fulfill-

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ment of the contract. The provision for advances at particular stages of the work is a very usual one where an expensive undertaking is contracted for, and it only shows that the party advancing is willing thus to assist the artizan provided that he can see that the work is going on in good faith, so as to afford a reasonable prospect that he will realize the avails of his expenditure in a reasonable period. The argument for the defendants would be somewhat stronger if we could say that the amount to be advanced at the several stages mentioned was understood by the parties to be the price or equivalent for the labor and materials already expended. This by no means appears, but on the contrary there is strong reason to believe, that in this case a considerable portion of the price was to be at all times kept back in order to secure the speedy completion of the contract. When Bridger & Co. failed only three thousand dollars of the five thousand had been paid, and they would not be entitled to any more until the barge was finished, and yet it cost only seven hundred dollars to complete it. This renders it improbable that the parties could have intended the sale and purchase of so much as was done at the several stages of the work at which payments were to be made, if indeed such a contract were not in itself so much out of the course of the ordinary conduct of parties as not to be assumed without unequivocal language.

The decision in *Clarke v. Spence* is placed very much upon the idea, that parties may have contracted in reference to the doctrine announced in *Woods v. Russell*. That argument can have no force here, but on the contrary the inference to be drawn from our own cases and particularly from *Merritt v. Johnson*, would be that the title remained in the builder under such a contract until the completion of the vessel.

The foregoing considerations have led me to the conclusion that the modern English rule is not founded upon sufficient reasons and that it ought not to be followed. The judgment of the supreme court should therefore be reversed and a new trial ordered.

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PARKER, J. The question we are called upon to decide is, whether, under the rules of law applicable to the contract, the barge, at the time of the assignment to the plaintiffs, belonged to Bridger & Bishop, who constructed it, or to the defendants, who employed them to build it.

The general rule is, that if a person contract with another for a chattel, which is not in existence at the time of the contract, though he pay him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. The case of *Mucklow, assignee of Royland, v. Mangles*, decided in England in 1808, (1 *Taun.* 318,) recognized, to the fullest extent, the general rule I have stated. It was an action of trover by the assignees of a bankrupt for a barge and other effects. Royland, who was a barge builder, had undertaken to build the barge in question for Pocock. Before the work was begun Pocock advanced to Royland some money on account, and as it proceeded he paid him more, to the amount of £190 in all, being the full value of the barge. When it was nearly finished, Pocock's name was painted on the stern. Two days after the completion of the work, and before a commission of bankruptcy had issued, the defendant, who was an officer of the sheriff, took the barge under an execution against Royland, the barge at the time of the levy not having been delivered to Pocock. It was held that the title to the barge had never passed from Royland to Pocock, and judgment was given for the plaintiff. The correctness of this decision has never been questioned, either in England or this country, but has been repeatedly followed in both. In this state, the more prominent cases are *Merritt v. Johnson*, (7 *John.* 473;) *Gregory v. Stryker*, (2 *Denio*, 628;) and *Johnson v. Hunt*, (11 *Wend.* 189.)

But it is sought to take this case out of the general rule, because the work was to be performed under the direction of a superintendent employed by the defendants, and was to be paid for at specific stages of the work. The first of the English cases relied on to sustain that position, is that of *Woods, as-*

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*signes of Paton, v. Russell*, (5 Barn. & Ald. 942,) which was decided in 1822. Paton, a ship-builder, had contracted with Russell to build a ship for him and complete it in April, 1819; Russell to pay in four instalments. The first and second instalments were duly paid. In March, 1819, Russell appointed a master, who superintended the building. On Paton's signing the usual certificate of her build, the ship was registered in Russell's name, and on that day he paid Paton the third instalment. It was held that the general property was vested in Russell from the time the registry was completed, but that the plaintiff had a lien for the work done after payment of the third instalment. There seems to me to be enough in that case to sustain the judgment, independent of the circumstances relied upon by the defendants in this action. The registry of the vessel in the name of Russell on the certificate, and by the aid and procurement of Paton was equivalent to a delivery, and was conclusive to show that the parties to the contract agreed that from that time the property belonged to Russell.

In delivering the opinion of the court, Abbot, Ch. J. said, "It is part of the terms of the contract, that given portions of the price should be paid according to the progress of the work: part when the keel is laid and part when they are at the light plank. The payment of these instalments, appears to us, to appropriate specifically to the defendant, the very ship so in progress, and to vest in the defendant a property in that ship; and that as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because, here, Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant."

The decision in *Woods v. Russell* seems very improperly to

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have been considered as resting on the ground first stated in the extract I have made. (*Atkinson v. Bell*, 8 *Barn. & Cress.* 277 ; 15 *Eng. Com. L.* 216.) And so far it has evidently been looked upon with distrust and followed with reluctance in the later decisions of the English courts.

In *Clarke et al. v. Spence et al.* (4 *Adol. & Ellis*, 448, 31 *Eng. Com. L.* 107,) the plaintiff contracted with a ship-builder to build him a ship for a certain sum, to be paid in instalments, as the work proceeded. An agent of the plaintiff was to superintend the building. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship and all the instalments were paid or tendered. In trover, by the plaintiff against the assignees, for the ship, it was held that on the first instalment being paid, the property in the portion then finished became vested in the plaintiff, subject to the right of the builder, to retain such portion for the purpose of completing the work and earning the rest of the price, and that each material, subsequently added, became, as it was added, the property of the general owner. This decision was made, as was said by Williams, J. who delivered the judgment of the court, "with some hesitation," and entirely upon the authority of the expression in the opinion of the court in *Woods v. Russell*, first above quoted. Williams, J. conceded, that the facts in the case of *Woods v. Russell*, did not make it necessary to determine the point, whether the building of the vessel under the superintendence of a person appointed by the purchaser, and the payment of instalments at particular stages of the work, vested the general property in the purchaser, and added, "Neither did the decision of the court proceed ultimately on any such point, but on the ground that the vessel by virtue of the certificate of the builder had been registered in the name of the purchaser, and that the builder had by his own act declared the general property to be in the purchaser." And he proceeded in a very full and able opinion to show that the opinion, thus extra-judicially expressed in *Woods v. Russell*, was in conflict with well established rules of law. Williams, J. said, "Until the last of the



necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, and not for parts of a vessel; and we have not been able to find any authority for saying, that whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed shall rest in the purchaser, except the above passage in the case of *Woods v. Russell*." And he followed the authority of *Woods v. Russell* on the ground that it had been subsequently recognized, and that such construction had probably been acted upon since the decision, by persons engaged in ship-building.

The case of *Woods v. Russell*, and *Clarke v. Spence*, were recognized in *Laidler v. Burlinson*, (2 Mees. & Wels. 602,) though they were not followed, being inapplicable to the case then before the court.

It cannot be denied but the decision in *Clarke v. Spence* covers the whole ground assumed by the defendant's counsel in this case, but it has never yet been followed in this country. In *Moody v. Brown* (34 Maine R. 107) allusion is made to such an exception to the general rule, but it was unnecessarily said, inasmuch as it was adjudged that the case did not come within such an exception. It has also been stated in the elementary books as resting on the English decisions I have cited. (*Story on Sales*, § 315, 316; *Chitty on Cont.* 378; *Long on Sales*, 288. I find no adjudged case in which the exception claimed has been applied in this country, and the case of *Clarke v. Spence* not being authority of itself, ought not to be followed here if it is in conflict with well settled principles of law, or inconsistent with decisions made in our own state. We are not placed in a situation to feel any of the embarrassment from a supposed precedent under which the court felt compelled in the case of *Clarke v. Spence*, to make a decision inconsistent with their own reasoning and against their own good judgment. A well established general rule, if founded

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*Andrews against Durant.*

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upon principle, should not be invaded by an exception without good reason.

The question is simply what was the contract of the parties. (2 *Mees. & Welsb.* 602.) If it was intended that certain parts of the vessel should pass to the defendants, as the work progressed and was paid for, it was very easy for the parties to have so provided in the contract in express terms. As they did not do this, we must gather the intent from the contract as expressed. It is not a contract to purchase parts of a barge, but an entire vessel; and the general rule that the title does not pass till completion and delivery, must control the construction unless a different contract is to be implied from the fact that the barge was built under the superintendence of a person employed and paid by the defendants, and was paid for by instalments at certain stages of the work.

It cannot be claimed that the employment of a superintendent who decided upon the quality of the materials and approved the work, amounted to a delivery of the parts as the work progressed; but it is supposed that inasmuch as it bound the builders to deliver that particular barge and took away from them the right to substitute another in its place, it amounted, together with the payments, to a transfer of the general property to the purchaser. The mere payment by instalments at specific stages does not of itself imply anything further towards a change of title to property, than the payment of instalments at fixed periods of time. Now, conceding that the effect of both these circumstances combined, is to place the builder in a situation in which he would be bound to finish and deliver the specific vessel begun, it by no means follows, that they vest the title to the vessel in the purchaser before its completion. It becomes, in such case, simply a contract for the finishing and delivery of that particular vessel; and the obligations upon the parties are the same, as if the builder had contracted to finish and deliver a particular vessel partly constructed at the time of the contract.

*Merritt v. Johnson* (7 *John.* 473) was a case in which it was adjudged that the property to the vessel remained in the builder

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until completion and delivery, though some of the materials employed had been furnished by the purchaser.

The question of ownership by no means depends upon the right that a particular article in preference to another shall be finished for the purchaser. In *Merritt v. Johnson*, (*Supra*.) Travis agreed to build a ship for E. Merritt and to furnish the timber for the frame, and E. Merritt was to pay in instalments and furnish the materials for the joiner's work. E. Merritt furnished various materials and advanced money to Travis with which to purchase other materials, and afterwards assigned the contract to D. Merritt, who continued to furnish materials and advance money to Travis on the contract, until about one-third the vessel was finished, Travis having furnished the materials he was bound to supply under the contract, when it was levied on under an execution against Travis and sold by the sheriff to C., who afterwards completed the vessel and sold her to Johnson. An action of trover being brought by D. Merritt against Johnson, it was held that the property in the vessel was in Johnson, and that D. Merritt could not have any property in the vessel under the contract until she was completed and delivered to him. This was therefore a case where the ownership remained in the builder, though he would have no right to have substituted another vessel in its place, part of the materials having been furnished by the purchaser. It appeared in *Merritt v. Johnson* that the ship was built upon ground hired by Travis, and in this suit the barge remained at the yard of the builders. It is said however in *Johnson v. Hunt*, (11 *Wend.* 139,) that had the fact been different in *Merritt v. Johnson* it would not have changed the result. (See also *Blackburn on Sales*, 158; 2 *Denio* 628; 21 *Pick.* 205.)

I think the legal title to the barge remained in the builders at the time of their assignment to the plaintiffs, and the judgment of the supreme court should be reversed and a new trial ordered.

Judgment reversed, and new trial ordered.

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Hyatt against Seeley.

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In the matter of HYATT, administrator, *against* SEELEY.

An application by petition to the supreme court, under the statute to compel a specific performance by infant heirs of a contract for the sale of land made by the ancestor, is a special proceeding within section eleven of the code of procedure.

An appeal lies to this court from a final order affecting a substantial right made by the supreme court at general term upon such an application.

Neither infants or their guardians appointed for that purpose can convey land, except pursuant to the order of the court.

Therefore, where the order directed infants to convey *all their interest in certain real estate, the deed to be executed by Josiah S. Mitchell, their guardian ad litem, in the name and behalf of the infants*; HELD, that a deed, reciting the appointment of Mitchell as their guardian, in which they were named as parties of the first part without the guardian name being mentioned, and which was executed and acknowledged by the infants, and by Josiah S. Mitchell, without any addition to his signature indicating the character in which he executed, was not pursuant to the order, or one which the purchaser was bound to accept.

Under such an order, a deed containing the names of the infants, "by Josiah S. Mitchell their guardian," as parties of the first part, but executed by him, by subscribing "Josiah S. Mitchell guardian &c." is defective. *Per* SELDEN, J. The guardian should execute the deed by subscribing the name of the infant, and adding "by Josiah S. Mitchell his guardian ad litem." *Per* SELDEN, J.

Whether, if the ancestor contracts to convey with covenants as to title, the court has power on an application under the statute for specific performance, to require the heir to convey by a deed containing personal covenants, *quere*. *Per* SELDEN, J.

But where the order of the court merely directs the infants to convey their interest, personal covenants inserted in a deed executed on their behalf are void. *Per* SELDEN, J.

Where the order in its recitals mentions five minor heirs, and that J. S. Mitchell had been appointed guardian of said minors, but omits the names of two of them in that part directing a conveyance, a deed executed by the guardian on behalf of all, passes no title as to the two. *Per* DENIO, J.

In December, 1847, Joseph R. Hyatt, the intestate, and Columbus W. Seeley, the appellant, entered into a contract for the sale by the former to the latter of certain real estate. The purchaser, Seeley, was to assume the payment of a mort-

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Hyatt against Seeley.

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gage upon the premises for \$2000, and to pay \$3000 in cash on the first day of April, 1848, when a deed was to be executed. The contract provided for a deed with *full covenants*.

Joseph R. Hyatt died on the 24th of March, 1848, leaving six adult and five infant children. Letters of administration were granted to the petitioner, one of the adult children, on the 31st of March, 1848.

On the 12th of April, 1848, the petitioner presented his petition to the supreme court, pursuant to the statute, setting forth these facts and praying for an order directing a specific performance of the contract. The adult heirs and the appellant Seeley consented in writing, that the prayer of the petition might be granted.

The court appointed a guardian ad litem for the infant defendants, and ordered a reference to ascertain the facts. The referee made a report, dated May 8, 1848, and at a special term of the supreme court, held in the city of New-York on the 6th day of June, 1848, an order was made, by which after reciting the previous order of reference and the report of the referee it was ordered and decreed; 1. That the agreement for the sale was reasonable and proper and ought to be carried into effect, and that it should be specifically performed: 2. That the heirs, naming them severally, execute and deliver to Seeley "their deed of conveyance of all their interest," in the premises: In this clause of the order there was an omission of the names of *two of the infant heirs*, but in its previous recitals the names of all appeared, and that Mitchell had been appointed their guardian: 3. That the guardian ad litem, Josiah S. Mitchell, execute the deed, "*in the name and behalf of the above named infant children of the said Joseph R. Hyatt, deceased:*" 4. That Seeley pay the purchase money of \$3000, and the interest thereon from the 1st of April, 1848, on receiving the said deed. The order, also, provided that either party might apply thereafter to the court for its aid to carry it into effect.

In pursuance of this order a deed, purporting to be from all the heirs to Seeley, was prepared, reciting the contract and the

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*Hyatt against Seeley.*

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proceedings to compel specific performance, and conveying the premises in fee to Seeley. The deed purported in the body of it to be by the infant heirs, who were there named, "by Josiah S. Mitchell, their guardian," and was executed by all the adult heirs, and by the guardian ad litem in this form: "Josiah S. Mitchell, guardian, &c." L. S. without naming the infant heirs for whom he was guardian. The deed contained no covenants of any kind. Upon the tender of this deed to Seeley, he refused to accept it or to pay the purchase money. In August, 1848, the petitioner prepared another petition to the supreme court, reciting the previous proceedings and praying that Seeley might be compelled to comply with the terms of the order of the 6th of June. This petition was presented at a special term of the court, in September, 1848, but no order was made upon it. The court, however, on the 2d of October, delivered a written opinion, in which it was held, that Seeley was concluded by the order of the 6th of June, but that that order was defective in not prescribing the form and nature of the deed to be given by the heirs; that Seeley was entitled to a deed with *full covenants*, and that upon a tender to him of such a deed, if he still refused to pay, he would be liable to be attached; and, thereupon, the court, for the purpose of enabling the heirs to prepare and tender such a deed, suspended the disposition of the motion.

A second deed was then prepared, from the heirs to Seeley, containing full personal covenants on the part of the heirs, infant as well as adult. This second deed recited the appointment of Josiah S. Mitchell as guardian of the five minor heirs, but in the body of the deed it did not purport to be made by them or on their behalf by him as their guardian, and it was signed by all the heirs, including those who were infants, and also by Josiah S. Mitchell, *in his own name*, without any addition to indicate the character in which he signed; his name appearing above and prior in order to that of one of the infant heirs.

Upon the tender of this deed to Seeley, he still refused to pay or to accept the deed. An order to show cause, &c. was thereupon made, founded upon the previous proceedings, upon

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*Hyatt against Seeley.*

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the hearing of which, on the 28th day of February, 1849, an order was made requiring Seeley to receive the *second* deed and pay the purchase money, with interest, from the 1st of April, 1848.

Upon a rehearing, before the general term, sitting in New-York, the order was affirmed; from this order of affirmance, the purchaser, Seeley, appealed to this court.

*N. Hill, Jr.* for appellant.

*S. Beardsley*, for respondent.

SELDEN, J. The first question which this case presents, is whether the order from which the appeal was taken is appealable. The code (*section 11*) gives an appeal to this court from "a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."

I see no reason to doubt, that this is to be regarded as a special proceeding, and not an action. An action is defined by the code to be an *ordinary* proceeding in a court of justice. (§ 2.) This definition can hardly be held to embrace a proceeding, which is purely statutory and new; and which is conducted in no respect, according to the ordinary forms of the common law. There is neither process or pleadings or issue joined, as in ordinary actions. The whole proceeding is peculiar and unknown to our courts, except by special statutory provision, and is therefore aptly described by the term *special proceeding*. Besides, if it is not a special proceeding it must be a civil action. But section 127 of the code provides that, "civil actions in the courts of record of this state, *shall be* commenced by the service of a summons." This would seem necessarily to imply, that no proceeding not so commenced, can properly be deemed a civil action. That the order appealed from is final, and affects a substantial right, is not denied. It follows, therefore, that it is appealable. The question then is, was it correct? The

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*Hyatt against Seeley.*

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order required the appellant to accept the *second* deed and pay the purchase money. It cannot, I think, be successfully maintained, that the covenants contained in that deed are binding upon the infant heirs, for two conclusive reasons. First: Assuming that the court had power, in an application under the statute to compel the specific performance by heirs of the contract of their ancestor, to decree that infant heirs should execute a conveyance containing personal covenants, a question I do not intend to pass upon here; still, there could be neither equity nor propriety in requiring them to assume obligations, beyond such as would have legally devolved upon them, in case the contract had been carried into execution by the ancestor himself. If they are to be bound by covenants at all, it should obviously be to the same extent *only*, as they would have been bound by the covenants of the ancestor, had the deed been executed by him; a liability which would of course be limited by the amount of their inheritance from the ancestor, and should be so expressed in the deed executed by the heirs. A second and equally conclusive reason why the infant heirs could not be bound by the covenants in this deed, is, that there was no decree or order of the court requiring them to execute a deed with covenants. They clearly had no power to bind themselves, nor their guardian ad litem to bind them by *voluntary* covenants, entered into without the authority or direction of the court.

If, therefore, the appellant Seeley had a just right to insist upon a deed containing covenants on the part of the heirs; it is clear that he was not bound to accept the deed in question. But the order of the sixth of June, 1848, which directs the execution of the deed, recognizes no such right, and imposes upon the heirs no such obligation. It simply directs a conveyance by the heirs of *their interest* in the premises. Unless, therefore, the appellant can look beyond that order, he can now only require a naked conveyance without covenants.

Hence it was insisted upon the argument by the counsel for the appellant, that the order of the sixth of June was in its



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nature interlocutory, and not final, and therefore open to review upon this appeal. But I apprehend, that this position can hardly be sustained. That order disposed of every question before the court and fully settled the rights of the parties; nothing was reserved, nothing left to be adjudicated. There was no occasion for any further application to the court unless one or the other of the parties should refuse to comply with the order. It was, therefore, in every sense a final order, by which the parties, unless they appealed, must be held to be absolutely concluded. So it was viewed by the justice at the special term in October: but he at the same time expressed the opinion, that the order was defective in one respect, viz: in omitting to prescribe the form of the deed, and to require the heirs to execute a conveyance with *full covenants*, and he suspended the decision of the motion before him, to give the heirs an opportunity to prepare and tender such a deed.

The conveyance, which the order appealed from required the appellant to accept, was executed and tendered in pursuance of this intimation at special term. But it is clear, that the respondent's case has not been strengthened by the addition of the covenants in the deed. Those covenants, at least so far as the infant heirs are concerned, being as has been already shown utterly void. That deed therefore is to be viewed precisely as it would be with those covenants stricken out, and the whole case upon this appeal turns upon the question, whether the deed in question is properly executed, and whether independent of the covenants, it contains all that is requisite to make a perfect conveyance, in conformity with the order of the sixth of June, 1848. The covenants, though inoperative and void as to the infant heirs, do not vitiate the residue of the deed. I think the deed is in form sufficient, notwithstanding the void covenants, but the difficulty lies in the manner of its execution. The direction in the order is as follows: "the said deed of conveyance to be executed by *Josiah S. Mitchel*, the guardian ad litem, in

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*the name* and behalf of the above named infant children of the said Joseph R. Hyatt, deceased."

The proper mode of executing a deed pursuant to such a direction would be, for the guardian to subscribe the name of the infant, and then add "by J. S. M. his guardian *ad litem*;" and so it was held in the matter of Windle, (2 *Edw. Ch. R.* 585.) The precise form, however, is not essential, but the order of the court must be followed in substance, at least. The order is, that the deed be executed *by the guardian in the name* of the infants. Instead of this, the infants have *themselves* executed in their own names. It appears no where upon the face of the deed, except in the recital of the proceedings to compel a specific performance, that any of the grantors were infants, or that they had a guardian *ad litem*. In naming the parties to the deed who convey, there is no allusion to the guardian, nor to the fact that any of them were infants. That portion of the order which directs the *guardian* to convey *in the name* of the infants is not referred to in the recital, or in any part of the deed. The name of the guardian appears to the deed underneath the names of four, and over that of one of the infants for whom he was guardian, with *nothing whatever* to distinguish it from that of any of the other grantors. Perhaps all these omissions and irregularities may not invalidate the deed. But if it be admitted, that by resorting to inferences, and by connecting the deed with the previous proceedings, its true character may be ascertained and its validity as against the infant heirs established, which I do not regard, however, as by any means clear; still neither the petitioners nor the heirs had any right to impose upon the appellant, nor was he bound to accept a title embarrassed by such a question. As he was deprived by the order of the sixth of June of all claim to covenants from the heirs, he had at least a right to a deed upon the due execution of which, no cloud should rest. Courts have always, for obvious reasons, been more rigid in exacting a due observance of formalities in respect to instruments under seal, and especially such as convey the title to lands, than to those of a mere commercial

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Hyatt against Seoley

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character, whose existence and functions are comparatively ephemeral.

There seems to have been nothing in the way since the order of the 6th of June, 1848, of compelling a specific performance by the appellant of the contract in question, but the omission to execute a proper deed pursuant to the directions of that order. If the deed first tendered is to be regarded as in all respects perfect, it could not of course avail the respondent here; because the order appealed from required the appellant to accept the *second* deed. But the first deed was defective in not being *executed in the name* of the infants as required by the order. The guardian signed his own name, adding "Guardian, &c." but omitted to subscribe the names of either of the infants. In all other respects, that deed was such a one as the order directed, and contained all that the appellant had a right to require under the order, and the defect in the manner of its execution may not have been fatal, as the deed purports in its commencement to be made by *the infants* by their guardian ad litem. It is unnecessary, however, to pass upon this question here.

The order appealed from must for the reasons given be reversed.

DENIO, J. I am of opinion that the order appealed from cannot be sustained.

(1.) The order of 6th June, 1848, is defective, in omitting the names of two of the infant heirs—Parmelia and Joseph Effingham Hyatt. They are not embraced in the direction to convey. This is the only order there is among the papers, adjudging that the contract should be specifically performed. It is fatally defective in the particular mentioned.

(2.) The second petition was framed with a double aspect; i. e. either to carry the above mentioned order into effect, or as an original petition for specific performance. The first branch of it was the one which was pursued in the subsequent proceedings. A new deed was prepared, based upon the order of the 6th June; and it is this deed which the appellant was

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*Hyatt against Seeley.*

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ordered to receive, as an execution of the contract of sale. The deed was signed and executed by all the heirs, including the two infants, whose names are omitted in the order. The grant which they profess to make is void, because, being infants, they could not convey except according to an order made pursuant to the statute, and the order does not embrace them. In other respects the deed does not conform to the order. That requires the *guardian ad litem* to execute the deed in the name and behalf of the infants. It was not so done. The deed appears to have been executed and acknowledged by the infants themselves, though one of them was only about seven years old; and it contains in form personal covenants on their part. Mr. Mitchell, it is true, signed it, but it does not appear in what character.

If Seeley shall be compelled to accept this deed and pay the price of the land, he will not, I think, have a title to the shares of any of the infants, certainly not as to Parmelia and Joseph Effingham Hyatt.

The order of the 28th February, 1849, was a final order upon the second petition. The object of that petition was to bring Seeley into contempt for not performing the former decree. It was a special proceeding, originating in the second petition, and the order appealed from was a final order affecting a substantial right.

The order appealed from should be reversed, without prejudice to any other proceedings, by complaint or petition, which the administrator or heirs of Joseph R. Hyatt shall be advised to take.

Order appealed from reversed.

## CARPENTER against STILWELL and another.

A sheriff, upon whom a fine has been imposed by the court to the amount of an execution issued to him, for wilful neglect of his duty in regard to it, and who pursuant to the order of the court has paid the fine to the judgment creditor, has no authority to enforce the execution against the debtor for his own indemnity.

For has he authority to do so where the amount of the fine was paid with his moneys by a third person, and the judgment assigned to such third person to be held for the sheriff's benefit.

In selling property under an execution, a sheriff acts by virtue of a power: if the power does not exist, no title passes.

Therefore, where a sheriff was fined by the court to the amount of an execution in his hands, for neglecting to return it, and after the fine had been paid to the judgment creditor with moneys of the sheriff, and the judgment assigned to a third person for his benefit, the sheriff sold the real estate of the debtor on the execution, and executed a deed of the same to a judgment creditor who redeemed; *Held*; that the sale was void, and no title passed by the deed.

An officer cannot execute final process in his own favor, or for his own benefit.

A request to charge the jury should be in such form, that the court may charge in the terms of the request without qualification.

A party is not estopped from denying that an officer had power to sell his property under an execution, unless it appear that acting with knowledge of the facts invalidating the power, he misled the purchaser.

THE plaintiff brought this action in the city court of Brooklyn, for the recovery of certain real estate within that city. Upon the trial he gave evidence of title in himself, and that the defendants were in possession of the premises claimed, at the time of the commencement of the action.

The defendants gave in evidence the records of two judgments against the plaintiff, recovered in the supreme court on the 11th day of March, 1846, one in favor of Thomas B. Coddington for \$445,80, and the other of Palmer Sumner for \$248,14, and duly docketed in the county of Kings; also, executions issued thereon on the 25th day of April, 1846, to the sheriff of the county of Kings, and a certificate of a sale of the premises in question under the same, on the 15th day of December, 1847, to one

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*Carpenter against Stilwell.*

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Henry P. Cropsey, and an assignment of the certificate of sale on the 17th day of March, 1849, from Cropsey to the defendant Stilwell. Evidence was also given of a redemption of the premises on the 14th day of March, 1849, by the defendant, Stilwell, as assignee of four judgments against the plaintiff. The defendants also gave in evidence a deed of the premises from the sheriff of the county of Kings, to Stilwell, dated March 16, 1849, acknowledged and recorded March 17, 1849, reciting the sale under the executions upon the judgments in favor of Coddington and Sumner, and the redemption of the property by the grantee, and conveying the premises with other property in consideration of \$1242,70, being the amount paid to redeem.

The plaintiff then offered in evidence proceedings against the sheriff upon the relation of Coddington and Sumner, for not returning the executions issued to him upon their respective judgments, and that upon the return of attachments against him, in May, 1847, the court imposed a fine upon him for the non-return of such executions, to the amount of the judgments and the costs of the proceedings, and ordered him to be committed until it was paid; and to prove that on the 2d day of September, 1847, and before any further proceedings were had, the sheriff paid the amount ordered by said court to said Coddington and Sumner respectively.

The defendants objected to the admission of the evidence on several grounds, only one of which was urged in this court, to wit, that "The payment of said fine by the sheriff did not extinguish his power to sell under said executions." The court overruled the objection and the defendants excepted. The attachment proceedings were then put in evidence by which it appeared that the court by an order made May 15, 1847, adjudged that the sheriff had been guilty of a contempt in wilfully neglecting and refusing to return the executions, and that such misconduct was calculated to and actually did impair, impede, and prejudice the rights and remedies of the relators, and did order and impose a fine of \$751,82 on said sheriff, and

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*Carpenter against Stilwell.*

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that \$265,33 of the same be paid to Sumner, and \$486,49 to Coddington, and that he pay \$49,44 the costs of the proceedings, and that he stand committed until said fine and costs were paid; said order provided, that on said sheriff's paying instanter \$49,44, the costs, all further proceedings upon it should be suspended until the 3d day of July then next. The amounts ordered to be paid to the relators were the amounts of their respective judgments, and the whole sum was paid to their attorney about the 2d day of September, 1847, and some time thereafter and before the sale in December the judgments were assigned to George P. Jenkins, a son of the sheriff. Evidence was given of an understanding between the attorney of the judgment creditors and the attorney of the sheriff and his son, at the time of the payment of the money, that the assignments would be made and that the attorney of the plaintiffs in the execution was authorized to make such assignment. Evidence was also given tending to show that the money paid was the money of the sheriff and not of the son, the assignee, and that the assignment was for the benefit of the sheriff. At the sale of the premises by the sheriff they were purchased by Cropsey, his brother-in-law, who paid no money but applied the amount upon a debt against George P. Jenkins, for which the sheriff was liable as surety, and after the redemption by Stilwell and the execution of the sheriff's deed, Cropsey received his money from Mr. Waring, the attorney of the sheriff, and at his request executed an assignment of the certificate to Stilwell. Mr. Waring, the attorney of the sheriff and of his son, testified that his object in the negotiations was to protect the sheriff and to indemnify him, and he completed the arrangements for the purchase and then told the sheriff to go on and advertise the property; that before this he had named the matter to George P. Jenkins the son, who said he would buy the judgments—that the witness saw the plaintiff several times after the property was advertised for sale; that he wanted to arrange the matter and get the sale deferred, and was told by the witness, that the judgments had been assigned to George P.

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*Carpenter against Stilwell.*

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**Jenkins.** On a cross-examination he testified that he made no final arrangement until the 6th of September, 1847; that Haynes, one of the sureties of the sheriff, first suggested the taking of the assignment to George P. Jenkins. It did not appear, that the plaintiff was present at the sale by the sheriff.

The judge charged the jury amongst other things, that the proceedings by the defendant Stilwell to redeem the premises were regular and valid; and that the important question was whether at the time of the sale, the sheriff had in law any valid or subsisting power to sell the lands of the plaintiff, under the executions upon the Coddington and Sumner judgments; that if they believed from the evidence, that the moneys paid to the plaintiff in the executions respectively were the proper moneys of the said sheriff, and that said payments were made by him or on his account in satisfaction of the fines imposed upon him by the supreme court, the sheriff could not lawfully enforce the judgments and executions for his own indemnity; and that the sale and conveyance made by him, if made under the circumstances and for the purpose so alleged by the plaintiff, was unauthorized, illegal and void as against the plaintiff, and did not affect his title to the premises in dispute; to which instruction the defendant excepted.

The judge further instructed the jury, that if before the money was paid to the judgment creditors, there was an agreement made by them or on their behalf with George P. Jenkins, that upon payment by him of the amount due upon the judgments they would assign the same to him; and the money was paid by him upon the faith of such agreement, and the judgments were assigned to him in pursuance of it, and the property of the plaintiff was subsequently sold under the executions by the directions and for the benefit of the assignee, the defendants were entitled to a verdict. That it was immaterial from what source the moneys paid by George P. Jenkins were obtained by him, if the jury believed they were his proper moneys and were paid by him on his own account and for his benefit, on a purchase by him of the judgments—that if the money so paid came from the



sheriff, it would not vary the legal effect of the transaction, provided it was paid by George P. Jenkins upon a purchase of the judgments in good faith, and not upon a nominal or colorable purchase made in his name, but in truth with the money and on behalf of and for the benefit of the sheriff—that it would have been legal for the sheriff to have made a gift of the money to his son, for the purpose of enabling him to make the purchase, and that it was for the jury to determine the real character of the transaction.

The defendants' counsel requested the court to charge the jury, that if the judgments had not been paid either by the plaintiff or by some person at his request, or with the intent to satisfy the same, then the defendants were entitled to recover; which the court declined to do, except as already charged. The defendants' counsel further requested the court to charge, that if the money was paid by the sheriff as a fine, that such payment did not extinguish or satisfy the judgments; which the court refused to do.

The defendants' counsel also requested the court to charge, that if the money was paid to the execution creditors or their attorney and received as a consideration for the assignments of the judgments, that then the judgments were not satisfied. The court refused so to charge without the qualification, "if the assignments were to be to any person other than the sheriff."

The defendants' counsel further requested the judge to charge, that if the money was paid and received as a consideration for the assignments of the judgments, then it was immaterial whether it was the money of the sheriff or not, and the judgments were not satisfied; the judge refused so to charge.

Lastly, the court was requested to charge the jury, that if they believed that the plaintiff knew that the judgment creditors had received the money and the judgments had been assigned, and that the property was advertised to be sold, and then endeavored to have the sale deferred and did not give any notice to the purchaser at the time of the sale, he is to be deemed as having acquiesced in the right to sell, and is estopped from setting up

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that there was no right or authority to sell; which charge the court declined to make: in which several particulars and refusals to charge, the counsel for the defendants excepted.

The jury rendered a verdict in favor of the plaintiffs. The defendants tendered a bill of exceptions, and after judgment upon the verdict in the city court of Brooklyn, appealed to the supreme court, which, sitting in the second district, reversed the judgment of the city court, and gave judgment in favor of the defendants, with costs. (*See 12 Barb. 128.*)

The plaintiff appealed to this court.

*Edward Sandford*, for the appellant.

*Samuel Beardsley*, for the respondent.

W. F. ALLEN, J. The sheriff was adjudged guilty of a contempt in the wilful neglect and refusal to return the executions against the plaintiff, upon which he subsequently sold his real estate, including the premises in question, and was ordered to pay to the judgment creditors a fine to the amount of their respective claims, as the damages which they had sustained by his default, together with the costs of the proceedings against him.

The only question of any importance is, whether a sheriff who by reason of his neglect to execute final process has been compelled, either by action or by proceedings as for a contempt to satisfy the claim of the execution creditor, can enforce the process against the property of the debtor for his own benefit and indemnity. The jury have found that the assignment of the judgments to the son of the sheriff was not upon a purchase by him or for his benefit, but was colorable and for the benefit of the sheriff and for his indemnity; and that the money to the amount of the judgments, and which was the only consideration of the assignments, was paid by the sheriff to the plaintiffs in the judgments, in satisfaction of the fines imposed upon him. As the sheriff could not do that indirectly which the law

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would not tolerate directly, the legal rights of the parties will not be varied by the form or disguise which the actors have given to the transaction. It was in substance and effect a payment of the judgments by the sheriff and an assignment thereof to him, and an attempt to enforce their collection for his own benefit. (*Bigelow v. Provost*, 5 *Hill*, 566.)

At the time of the sale of the property in question, the sheriff by whom the sale was made was the party and the only party beneficially interested in the execution of the process; and to allow an officer to wield the process of the courts in his own behalf, is contrary to well settled principles of public policy and would lead to great abuse. (*Per Platt, J. in Sherman v. Boyce*, 15 *John*. 443.) A sheriff cannot do execution when he himself is a party, and therefore an extort by him where he is conusee will be void. (*Com. Dig. Viscount, E. 1.*) By statute, process in actions in which the sheriff is a party, must be directed to and executed by the coroner of the county; (2 *R. S.* 441, § 84;) and whether the sheriff is nominally a party or only beneficially interested cannot affect the question. If he owns the judgment upon which the final process issues, it is process in his favor, although he may not be a party to the record, and his name may not appear in the writ. This was in effect decided in *Mills v. Young*, (23 *Wend.* 814,) in which the court say "a sheriff cannot execute final process in his own favor" and apply the principle to a case in which the deputy sheriff having become liable for the debt gave his own note to the judgment creditor, took an assignment of the judgment, and afterwards under a threat to enforce the execution, procured the debtor to give his note for the amount. The note was declared to be void. The danger of a perversion of the process of the court by an interested officer, is greater when the fact that the officer charged with its execution is the party in interest, is concealed, than when it is apparent upon the face of the process itself; and if policy forbids the execution by an officer of process to which he is a party by name, *a fortiori* should the execution of process by him, nominally in favor of others but really in his own favor, be forbidden. I am

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of the opinion that the acts of the sheriff for his own benefit in the execution of the final process of the court upon the judgments against the plaintiff, and the sale and conveyance by him of the premises in question were void; that when he became the owner of the judgments his power to act as sheriff under the executions ceased, and that his only remedy, if any he had, was to sue out a new execution to the coroner of the county.

But in this case, still back of the proposition considered and which I deem fatal to the defendants in this action, is the question made upon the trial and mainly relied upon in this court, whether the sheriff under the circumstances having become liable to the judgment creditors for the amounts of their judgments and been compelled to satisfy them, could be subrogated by assignment or otherwise, to the rights of the creditors, and entitle himself to enforce the judgments for his own indemnity.

It is not so much a question of individual right as of public policy. It is fit and proper that the judgment debtor should be made to pay his debts, and it is the province and business of the sheriff to whom process is issued to compel him to do so, by a proper, vigilant, and seasonable performance of his duty; but it is not discreet or consistent with just views of policy, by any inducements to encourage a lax or careless discharge of the responsible duties devolved upon sheriffs. If an officer intrusted with the execution of final process, may without peril of ultimate loss, select his own time for its execution, he may seriously interfere with the rights of the creditor by delaying the process to his prejudice, and he may at his option employ the same process to annoy and oppress the debtor and to make gain to himself. Both the debtor and creditor will be in a measure subject to the caprice of the sheriff, and serious inconveniences will result, if rights either equitable or legal are held to result to a sheriff from his own breach of duty. While it has ever been the policy of the law to protect an officer within proper limits from loss or damage in the faithful discharge of his duties, it has done nothing to encourage or protect him in the neglect or violation of those duties. The consequences of all violations

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of duty have been visited upon him, and he has not been supposed to be entitled to any equities beyond those which enure to any other wrongdoer.

The proceedings upon the attachment against the sheriff and the payment by him of the fine to the judgment creditors to the amount of their claims, was a satisfaction to them, and the plaintiffs therein had no further claim upon the sheriff in respect to the executions or right to enforce them against their debtor. The executions had fully accomplished their purpose, which was to raise the money to satisfy the judgment creditors, and that object being attained, the power conferred by the writs upon the sheriff was spent. (*Sherman v. Boyce*, 15 *John*. 443.) The court adjudged that the plaintiffs had sustained damages by reason of the default of the sheriff, to the full amount of their respective claims, and imposed a fine upon him to that amount and directed it to be paid to them, and the payment and acceptance of this fine necessarily operated to divest them of all power as well as right to enforce the process. (2 *R. S.* 588, §§ 19-21.) It has been uniformly held from a very early period, that in such case no right resulted to the sheriff, either to maintain an action against the debtor for money paid, or to retain and enforce the execution for his own benefit. No distinction has been taken between payments voluntarily made by the sheriff and those made upon compulsion in consequence of a liability incurred by him, and there is no difference in principle. It cannot be material whether a sheriff voluntarily pays the amount of a claim of his own money, or by a voluntary breach of duty places himself in a position in which the payment can be enforced against him. An action is denied to him because "such a practice would be not only against the rules of law but would tend to multiply suits and increase litigation." (*Jones v. Wilson*, 3 *John. R.* 484; *Menderback v. Hopkins*, 8 *id.* 436; *Whittier v. Heminway*, 9 *Shep.* 238; *Beach v. Vandenburg*, 10 *John.* 361.) The right to enforce the execution for his own benefit has been denied him from principles of policy and the "grand inconvenience" which would

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ensue. (*Reed v. Pruyn*, 7 *John.* 426; *Sherman v. Boyce*, 15 *id.* 443; *Mills v. Young*, 23 *Wend.* 314; *Bigelow v. Provost*, 5 *Hill*, 566.)

In *Reed v. Pruyn*, the court would not permit the deputy sheriff who had paid the debt to enforce the execution for his own benefit; and in *Bigelow v. Provost* the sheriff having been attached for not returning the execution, the deputy to whom it had been delivered paid the judgment and took an assignment of it for his own benefit, and it was held on a motion to set aside the execution, that he could not enforce its collection, although the defendant had promised to pay it to him. The learned judge by whom the decision was pronounced, while he regretted to see the moral obligation which had in that case been incurred by the debtor violated, was constrained to uphold the principles of policy which were involved in that case and which forbade the execution to be enforced at law. A deputy sheriff was held liable in trespass for selling the goods of the judgment debtor upon an execution, after the creditor had been paid from moneys raised upon the note of the debtor and the deputy sheriff, and under an agreement that the deputy should retain the execution in his hands, and if he was called upon to pay the note might proceed to sell for his own indemnity, and when the money was paid to the creditor he was told that the execution was not intended to be satisfied. Platt, J. says, "The debt must therefore be deemed satisfied as to the judgment creditor, and that fact being established, the law founded on wise policy considers the officer *functus officio*." "To allow any man to wield the process of our courts in his own favor, in order to exact such measure of justice as he may think due to himself, would not only lead to oppression and abuse but would tend to subvert the foundation of private rights and of civil liberty." (*Sherman v. Boyce*, 15 *John.* 443; and see *Hammatt v. Wyman*, 9 *Mass. R.* 138.) *Stevens v. Rowe*, (3 *Denio*, 327,) was an action on the case for not returning an execution, and Beardsley, J. in giving judgment on a motion for a new trial, says, "If the sheriff should be compelled to pay the full

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amount of the execution, for the reason that the judgment was a lien on real estate out of which the money might have been collected, as was offered to be proved on the part of the plaintiff, he would be entirely remediless. He could not enforce the judgment and execution for his own indemnity but must stand the entire loss ;” thus recognizing and reaffirming the doctrine of the cases before cited.

The debt being paid, the power to sell under the execution ceases, and as the process would not protect the officer, so no title could pass to the purchaser of property under it. The sheriff in making sale of property under process of the court, acts under a power, and if the power does not exist, no title passes even to an innocent purchaser. He who buys under a power buys at his peril and acquires no title without showing a valid subsisting power. (*Wood v. Colvin*, 2 *Hill*, 566 ; *Cameron v. Irwin*, 5 *id.* 272 ; *Deyo v. Van Valkenburgh*, *id.* 246 ; *Swan v. Saddlemire*, 8 *Wend.* 676 ; *Delaplaine v. Hitchcock*, 6 *Hill*, 14 ; *Carter v. Simpson*, 7 *John.* 535.)

It is not necessary to decide that the payment of the fine to the judgment creditors to the amount of their respective claims, was a satisfaction of the *judgments*. It is sufficient to say that such payment put an end to the power of the sheriff under the execution, that the process thereby became *functus officio* ; although were it necessary, in order to give effect to the reasons upon which the rule prohibiting a sheriff from enforcing process by way of indemnity against his own neglect is based, I see no reason why the judgments should not within the reason of the rule be held to be satisfied. But the question in this case was as to the power of the sheriff under the process upon the judgment which had accomplished its purpose, and the court below therefore were not called upon to pass upon the effect of the payment by the sheriff upon the judgments, and properly declined to do so when requested by the counsel for the defendants. The request was, however, to charge that if the money was paid by the sheriff as a fine, that such payment did not extinguish or satisfy the judgment, and did not quite

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meet the case. Perhaps payment of a mere fine would not have affected either the judgments or the process based thereon; but the fine was imposed under the statute and paid to the plaintiffs as a compensation for their damages, and the result is the same as it would have been upon a recovery of the same amount in an action upon the case for the same default. The same remark is in part applicable to the request to charge—that if the judgments had not been paid either by Carpenter or by some person at his request, or with intent to satisfy the same, then the defendants were entitled to recover. If the process having spent its force had become void, it was not material to inquire whether the judgment upon which it was founded was subsisting or not. Again, the intent with which the payment was made did not control its effect, and it would have been error to have held, that the absence of an intent to satisfy the judgment on the part of the person paying the claim to the creditor, would operate to retain the judgment in force. In *Sherman v. Boyce* the intent not to satisfy the judgment was clearly established, and yet it was properly held not to vary the legal effect of the transaction, and the same may be said of all the cases cited.

It was also claimed upon the trial, on behalf of the defendants, that if the plaintiff knew that the judgment creditors had received the money and the judgments had been assigned, and that the property was advertised to be sold and then endeavored to have the sale deferred, and did not give any notice to the purchaser at the time of the sale, he is to be deemed as having acquiesced in the right to sell, and is estopped from setting up that there was no right or authority to sell. Had there been nothing in the case, but the payment of the amounts of the judgments to the plaintiffs therein, and the assignment of them to George P. Jenkins, which are the only facts noticed in this connection by the defendants' counsel, the sale would have been valid, and the plaintiff could not effectually have objected to its validity. The important fact and to which no allusion is made, is that the payment to the creditors was made by the sheriff,



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and that he then became the owner of the judgments, and by the sale of the property was seeking to enforce the executions for his indemnity; and it was not claimed in this proposition, that at the time of the negotiations of the plaintiff with the attorney of the nominal assignee and of the sheriff, or at the time of the sale, this fact was known to the plaintiff, and if not known, his silence upon the subject could not estop him. The request, therefore, of the defendant's counsel to the court, to instruct the jury in this behalf, did not meet the case or any claim of the plaintiff, or any state of facts or any legal proposition upon which the plaintiff sought or was allowed to recover.

But had the proposition embraced the whole case, and knowledge of the true character of the transaction been brought home to the plaintiff before his negotiations for an extension of the time of payment, there would have been no estoppel. The doctrine of estoppels *in pais* is to be strictly guarded and carefully applied. Questions upon this branch of the law more nearly concern the conscience and have to do with good morals, and are less controlled by technical rules, than most legal questions that arise. The inquiry always is, whether the party against whom an estoppel is alleged, has by his actions or words influenced the conduct of others, so that a wrong will be done to those so influenced, if the party should be permitted to show a state of facts inconsistent with his actions and words. Beardsley, J. in *Frost v. The Saratoga Mutual Ins. Co.*, (5 Denio, 154,) says: "An estoppel *in pais* arises when one person is induced by the assertion of another to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner was allowed to contradict or disprove what he had affirmed." Lord Denman thus defines an estoppel of this character: "But the rule of law is clear, that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (*Pickard v. Sears*,

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6 Ad. & E. 469. See also to the same effect, *Watson's Ex'rs v. McLaren*, 19 Wend. 557; *Dezell v. Odell*, 3 Hill, 215.) In *Welland Canal Co. v. Hathaway*, (8 Wend. 480,) it was held that the acts or admissions relied upon by way of estoppel must have been intended to influence the conduct of the party setting them up; and *Griffith v. Beecher*, (10 Barb. 432,) is to the same effect. There was clearly nothing in the conduct or declarations of the plaintiff which could estop him from alleging the invalidity of the sale of the premises in question. 1. In his negotiations with Waring, the attorney, he made no declarations which he now seeks to gainsay. If he then knew the true character of the transaction, the same was better known to Waring and his principals, and his silence could not and did not mislead them. 2. There is no pretence that the plaintiff did any act or made any declaration, or refrained from speaking when he might and in good conscience should have spoken, with a view to influence the actions of any other person. He was not present at the sale, and there is no evidence that he knew the time and place at which the premises were advertised to be sold. Not being present his silence could not have influenced the conduct of those present, and his absence, without any knowledge of those present of the reasons of his absence, could not have induced them to suppose that he acquiesced in the sale. The plaintiff was not under any obligations to attend the sale. It was as much the duty of persons desirous of becoming purchasers at the sheriff's sale to seek the plaintiff, as it was the duty of the plaintiff to look after them. 3. There is no room for pretence upon the evidence, that the purchaser Cropsey in making the purchase, or the defendant Stilwell in acquiring the rights of the purchaser, were at all influenced in their actions by the conduct or declarations of the plaintiff. The court below therefore did not err in refusing to charge in this behalf as requested by the counsel for the defendants.

The offer of the plaintiff to prove the proceedings against the sheriff and the payment of the fine by the sheriff, was not as full as it might have been, and did not embrace in terms all the facts

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established by the evidence; but the evidence itself was competent, and formed a necessary part of the testimony showing that the sheriff was divested of all power and authority to sell upon the execution.

There was no error committed by the city court, and the judgment of the supreme court should be reversed, and that of the city court of Brooklyn affirmed, with costs in the supreme court and this court.

JOHNSON, J. The plaintiff having succeeded at the trial, and the supreme court having reversed the judgment for the plaintiff, upon exceptions taken at the trial by the defendants, and the plaintiff having appealed to this court from the judgment of reversal, we are to consider whether any of the defendant's exceptions are well taken.

The first of these exceptions relates to the ruling of the court upon an offer of the plaintiff to prove certain proceedings in the supreme court, showing that before the sale of the premises in question under executions by the sheriff, he had been fined by the supreme court for contempt in not returning those executions, to the amount which he had been commanded to collect upon them with costs; and that before any further proceedings were had, the sheriff paid the amount to the plaintiffs. The plaintiff insisted that such payment put an end to the sheriff's authority to sell on the executions. On the other hand, the defendants took several grounds of objection to the admissibility of the offered proof. The court ruled that the evidence was admissible, but did not decide any thing as to the effect of it when admitted. Its admissibility therefore is the only question before us. The decision of that question depends upon the view we shall take of the general question in the cause, which is whether a sheriff who has been fined in the amount of an execution for neglect of duty in respect to it, and who in pursuance of the order imposing the fine has paid the amount of the execution to the plaintiff therein, can without any order of the court imposing the fine, authorizing him so to do, proceed to

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sell real estate of the defendant upon the execution, for his own indemnity. That question will be considered when we come to the charge under which the case was submitted to the jury. If the plaintiff was right in respect to this last proposition, then the evidence offered was admissible, because it was a material part of the plaintiff's case upon the question stated.

The substance of the charge was that if the moneys paid to the plaintiffs in the executions were at the time of such payment the sheriff's moneys, and if the payment was made by or on account of the sheriff, in satisfaction of the fines imposed upon him for neglect of duty in returning the executions, the sheriff could not lawfully enforce the judgments and executions for his own indemnity; and that the sale and conveyance made by the sheriff, if made under the circumstances and for the purposes before stated, was illegal, unauthorized and void as against the plaintiff, and did not affect his title. To this the defendant excepted.

A purchaser under a power, is bound to see to it that the power exists. If it does not exist, he can acquire no title. (*Jackson v. Morse*, 18 *John.* 441; *Wood v. Colvin*, 2 *Hill*, 566.) The mere fact of paying a valuable consideration does not help his case, any more than it would if he purchased from a stranger to the title. The sheriff who sells under a judgment and execution exercises a statutory power, by virtue of which alone his deed can operate upon the title to the land sold. When the judgment has been paid, the authority to sell under it is gone. The plaintiffs in the executions on which the sale was made which is in question in this case, had received from the sheriff the whole amount of their judgments. If that payment had been voluntary on the part of the sheriff, he could not have proceeded to collect the executions for his own indemnity. (*Reed v. Pruyn*, 7 *John.* 426; *Sherman v. Boyce*, 15 *id.* 443; *Mills v. Young*, 23 *Wend.* 314; *Bigelow v. Provost*, 5 *Hill*, 566.) That no distinction exists between a voluntary payment and one made in discharge of a fine imposed on the sheriff for not returning an execution, is shown in the last case. The

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court which imposes the fine might probably provide, that the sheriff should have the benefit of the demand against the defendant. Such was probably the effect of the rule by which the fine was imposed upon the sheriff in this case, up to the 3d of July, 1847, until which time, on certain conditions proceedings upon the order were stayed. The object of the provision probably was to enable the sheriff even at that late period to save himself from the consequences of his previous misconduct, by going on under the execution against the property of the defendant. He did not avail himself of this privilege. After the period limited by the order he paid the money and then went on to sell for his own indemnity. The good policy of the rule which forbids such conduct on the part of the sheriff is plain. To protect him from the consequences of his misconduct in not enforcing the process in his hands, by subrogating him to the rights of the creditor, would in the first place take away a strong stimulant to a prompt discharge of his duty, and in the next place would as the cases say, "open a wide door to abuse and oppression."

The question whether a purchaser in good faith for a valuable consideration, and without notice, would stand in any better position to assert title, founded upon a sale, under such circumstances, was not made at the trial. If the defendants desired to take that ground they should have stated it in their exception, or called the attention of the judge to it by a proper request. The ground of bona fide purchase, does not seem to have been alluded to during the trial, except as one ground of the defendants' objections to the admissibility of the evidence offered on the part of the plaintiff, as before stated. In that aspect of it, the judge was required by the defendants to determine in advance that the defendants had made out a case of bona fides in the purchase, which was a question for the jury.

At the conclusion of the charge, several requests to charge were presented to the judge, which I proceed to notice. The first was, that if the judgments had not been paid, either by the defendant in the execution, or by some person at his request,

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or with the intent to satisfy the same, then the defendants were entitled to recover. That, if charged, would have been at least equivalent to holding that the sheriff himself could by the payment of his fine, if he did not thereby intend to satisfy the judgments, acquire the right to sell for his own indemnity under the executions. That proposition has been already disposed of. The next proposition was, that if the money was paid by the sheriff as a fine, such payment did not extinguish or satisfy the judgments. That naked question did not arise in the case. The question was, whether if the sheriff paid the money as a fine, he could afterwards enforce the executions for his own indemnity, not, whether that payment of itself extinguished or satisfied the judgments.

The third request was, that if the money was paid to the execution creditors or their attorney, and received as a consideration for the assignment of the judgments, then the judgments had not been satisfied or extinguished. The court refused so to charge without adding by way of modification, "if the assignments were to be to any person other than the sheriff." The request as made, involved the proposition that the sheriff might in that way acquire the right to enforce the judgment for his own benefit, and was therefore rightly rejected.

The next request involved the same proposition in more direct terms. It required the court to hold, that if the money was paid and received as a consideration for the assignment of the judgments, then whether it was the money of the sheriff or not was immaterial, and the judgments had not been satisfied or extinguished. It was rightly refused upon the ground before stated.

The last request was that the jury should be charged, that if they believed Carpenter, the plaintiff, knew that Coddington had received the money, and the judgments had been assigned, and that the property was advertised to be sold, and then endeavored to have the sale deferred, and did not give any notice to the purchaser at the time of the sale, he was to be deemed to have acquiesced in the right to sell, and was estopped from setting

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up that there was no right or authority to sell. This request was refused.

We have held, (*Bagley v. Smith, MS.*) that a request must be in such form that the judge may properly charge in the terms of the request, without qualification. Assuming that in this case the judge may have been bound upon a proper request to charge upon the question, whether the plaintiff was or was not estopped from denying the sheriff's authority to sell, several points not embraced in the request to charge, ought to have been added for their consideration. In the first place, knowledge on Carpenter's part that the judgments had been assigned, would have imposed no duty upon him to interfere to prevent the sale; because, as the court held upon the trial, if the assignment to Geo. P. Jenkins had been made to him for his own benefit, and upon payment out of his own funds, the sale would have been good; and knowledge on Carpenter's part, to bind him by an estoppel in pais, ought to have gone at least to the extent of acquaintance with the facts on which his rights depended. The request should at least have embraced knowledge on Carpenter's part that the judgments had been assigned for the benefit of the sheriff. In the second place, assuming that all the other facts mentioned in this request were sufficient, unless the defendants were purchasers bona fide, or at any rate were in some way misled as to their rights by Carpenter's silence, they could set up no estoppel. The refusal to charge this proposition was clearly correct.

DENIO, PARKER and EDWARDS, Js. concurred.

GARDINER, Ch. J. was in favor of affirming the judgment of the supreme court.

Judgment of the supreme court reversed, and that of the city court of Brooklyn affirmed.

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Livingston *against* Miller.

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LIVINGSTON *against* MILLER, survivor, &c.

Where rent is payable in wheat, fowls and services on a day named in each year during the term, "at the North river within the county of Columbia, or within lot No. three (situated in said county) as the lessor shall from time to time direct," the lessor can sustain an action on the lease for the value of the rent, without averring or proving that he directed the lessee where to deliver the articles or perform the service.

In such a case interest is recoverable on the value of the rent from the time it became payable.

APPEAL from the judgment of the supreme court sitting in the third district.

The action was covenant, commenced in 1847 upon a lease dated in 1822, executed by the plaintiff as lessor, and the defendant Miller and one Finkle, since deceased, as lessees.

The declaration averred the making of the lease, whereby the plaintiff demised unto the lessees a certain farm situate in Columbia county, and being part of subdivision lot three in great lot No. two in the manor of Livingston, during two lives, the lessees, "yielding and paying therefor unto the lessor, his heirs, executors, administrators or assigns, yearly and every year, on every first day of January during the term, at the North river within the county of Columbia, or within said lot No. three, as the lessor should from time to time direct, the rent of twenty-five bushels of good clean merchantable wheat of the first quality, four hens and two day's riding," and in and by which the lessees "did covenant, grant and agree to, and with the lessor, his heirs and assigns, that they and the survivor of them should and would well and faithfully pay, fulfil, accomplish and perform the rents and services in the manner therein above reserved." The declaration averred that although the plaintiff had always from the time of the making of the lease well and truly performed, fulfilled and kept all things in the lease contained on his part to be performed and kept, yet that the defendant as survivor of Finkle had not performed, fulfilled



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and kept the lease on his part as survivor; that after the death of Finkle, during the said term and on the first day of January, 1847, at Taghkanic, wheat, hens and riding of the value of \$2000 of the rent and services aforesaid had become and were due and still are in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning of the covenant of the lessees, to the damage of the plaintiff of two thousand dollars.

There was no averment in the declaration of any direction by the plaintiff as to the place for the payment of the rent or the performance of the services or of any demand of either.

The defendant pleaded *non est factum*, and with his plea gave notice that he would give in evidence and insist upon the facts of which he gave evidence at the trial as hereinafter mentioned.

The cause was tried at the Columbia circuit before Justice Parker and a jury.

The plaintiff to sustain the action read in evidence the lease mentioned in the declaration, which contained the reservation of rent and covenant to pay the same therein set forth, and also among other things a proviso, that if the yearly rents and services therein reserved should be in arrear or unpaid or unperformed in part or in all by the space of 20 days next after the times appointed, that then those presents and the estate thereby granted should cease, determine and be and become absolutely void and of no effect; and that thereupon it should and might be lawful to and for the party of the first part, the plaintiff, &c. into the said demised farm, to re-enter and the same to have again, repossess, retain and enjoy as of his and their first and former estate, any thing in those presents to the contrary notwithstanding.

The price of wheat, of riding and of hens was admitted; and it was proved that at the admitted prices the money value of the rents and services reserved in the lease, from Jan. 1, 1840, to Jan. 1, 1848, both inclusive, with interest, amounted to \$456.83; and then the plaintiff rested.

The defendant moved for a nonsuit upon the ground that the

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plaintiff had not shown that he had given any direction to the defendant where to pay the rent. The nonsuit was refused and the defendant excepted.

The defendant then proved and read in evidence, certain receipts for wheat and fowls on account of rent, some of which were signed by plaintiff, and some, dated at Taghkanic, were signed "for Robert S. Livingston, William H. Barringer." The defendant then called one Elijah Finkle as a witness, who testified, that he was present at a conversation between plaintiff and defendant in 1844 at plaintiff's house at Redhook. That defendant told plaintiff that he had a team of his own and was willing to do his days' riding whenever called on. He said he raised fowls of his own and was willing to pay them. That plaintiff said in reply, that whenever he came up to the new forge he would call on him, and if he did not call on him he need not pay him. The witness further testified, that the new forge is in the town of Taghkanic and belonged to plaintiff; that it is about three miles from the farm occupied by defendant, and is in lot No. 8 of the division of great lot No 2; that plaintiff's residence is in Dutchess county, about 20 miles from defendant's farm; that defendant for the last 20 years had teams on his farm. That in the conversation something was said about appointing a place to pay the rent. That defendant told plaintiff he should appoint a place any where in Columbia county where he should pay the rent, and he would pay it. He appointed no place, and made no reply to it that I can remember.

Upon cross-examination he testified that Miller had receipts, or what were called receipts at that time, which were handed to plaintiff and handed back to defendant; that defendant went down to settle the rent; he thinks something was said about Barringer—don't recollect plaintiff's telling defendant to go and settle with Barringer. That Barringer lived at new forge and was understood to be plaintiff's agent. That witness does not know whether this conversation was in regard to this or the Post farm, and does not recollect whether the remarks about

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Barringer were made before or after defendant asked plaintiff to appoint a place. The plaintiff then deducted from the amount above claimed by him, the value of 24 fowls, which by the receipts appeared to have been paid, and also all the days' riding and interest thereon which became due subsequent to the conversation in 1844, which deductions together amounted to \$14,87, leaving due as he claimed, \$441,46. No further evidence was given.

The defendant's counsel requested the judge to charge "that the defendant having requested the plaintiff to name a place where the defendant should pay the rent and the plaintiff having refused to do so, the plaintiff was not entitled to recover any rent which became due subsequent to such request." The request was refused, and the defendant excepted. He further requested the judge to charge, that as the defendant had proved that he had in the year 1844 informed the plaintiff that he had a team of his own and was willing to do his days' riding when called on, and that he raised fowls of his own and was willing to pay them, and that the plaintiff had told him that he would call upon him and that he need not pay if he did not call upon him, that the plaintiff was not entitled to recover pay for any of the riding mentioned in the case, or the fowls until he had made a demand of performance and had directed the defendant where to perform the services and deliver the fowls. This request was also refused, and defendant excepted.

The defendants' counsel also requested the judge to charge that the plaintiff was not entitled to recover interest upon his claim for services or for fowls or on the wheat rents. This also the judge refused to charge, and the defendant excepted.

The judge then directed a verdict for the plaintiff for the sum of \$441,46, and to this the defendant excepted.

The defendant applied for a new trial on a bill of exceptions, which was refused, and judgment rendered upon the verdict; from such judgment he appealed to this court.

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*John Van Buren*, for the appellant.

*H. Hogeboom*, for the respondent.

JOHNSON, J. The defendant's proposition upon the motion for a nonsuit was that under the provisions of the lease declared on, the plaintiff could not recover any thing without proving that he had directed the defendant to pay at one of the two places named in the covenant. This is the first and most important question we are called upon to examine in this case.

The decision of this court in *Livingston v. Miller* did not touch the question, although Mason, J. in his opinion discusses it and expresses his own opinion upon it. The court held that the pleadings had made material the issue whether the plaintiff had designated a place for the payment of the rent, and did not pass upon the question in this case.

*Van Rensselaer v. Jones*, (5 Denio, 449,) also leaves the question undecided. Whittlesey, J. it is true, says that in his view it was necessary for the lessor to point out the place of performance of the days' service with carriage and horses and make a special demand of performance, before he could maintain his action, but he also thought that the objection taken at the trial was too narrow to raise that point, and so concluded that a new trial should be denied. It is evident, however, from the preceding case of *Van Rensselaer v. Gallup* (5 Denio, 454,) that neither of his brethren concurred in the view which he had expressed as to the necessity of a demand. In the last named case, the lessor's executors had succeeded at the trial. Beardsley, Ch. J., while he thought a new trial ought to be granted upon the ground that an error had been committed as to the rule by which the rent had been apportioned on the trial, said that no demand of the days' service was requisite, and that it should have been performed on the day named in the lease for the payment of the rent, and McKissock, J. concurred with him; Whittlesey, J. differed with his brethren as to the apportionment, but adhering to the opinion which he had expressed in the

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other case as to the necessity of a demand, on that ground was also for a new trial. The point has, however, been substantially decided in two earlier cases in the supreme court, *Lush v. Druse*, (4 *Wend.* 313,) and *Remsen v. Conklin*, (18 *John.* 448.) In the first of these cases, the rent reserved was 18½ bushels of wheat, to be delivered annually on the first day of February in each year, at such place in Albany as the lessor, his heirs or assigns should appoint. It was objected that it was incumbent on the plaintiff to show an appointment of a place in the city of Albany for the delivery of the wheat and notice thereof to the defendant. But the court held that it was the duty of the lessee to have called on the lessor to know where he would have the wheat delivered, and to have delivered it accordingly, and that if the lessor could not be found, still the wheat must be delivered in Albany, and intimated that under those circumstances any place in Albany would probably have been sufficient. In the other case the covenant was substantially the same, and the question arose upon demurrer to a plea denying that the plaintiff had appointed a place in the city of Albany for the payment of the rent. The court gave judgment against the plea, holding that in an action of covenant for rent, it was not necessary that there should be a demand though the rent was in terms payable on demand. They advert also to the settled distinction between an action for the rent and a proceeding by the lessor with a view to the forfeiture of the tenant's estate, in which there must be a demand of the exact amount of the rent, at the proper time and place, although no such thing is necessary in an action to recover the rent. In these two cases, however, the court took different views as to the place where the rent was to be paid in the absence of an appointment by the lessor; Ch. J. Spencer being of opinion that in the absence of any appointment the rent was payable or to be tendered upon the land, and Ch. J. Savage in the latter case, thinking that it was payable or to be tendered any where in the city of Albany. That point, however, did not arise in either of the cases, as no tender or attempt to tender was shown in either. It was argued

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that these cases were distinguishable from the one at bar upon the ground that they fixed a place of payment, Albany, and that the lessor's election was therefore less necessary than an election in the case at bar. I think there is nothing in this distinction. Albany merely fixes the territorial limits within which the lessor might designate the place of delivery, but within the city his power of designation was uncontrolled. In the case at bar it appears from the lease, that lot No. 8 is in the county of Columbia, and then the rent is deliverable within that county, either at the North river or within lot No. 8. The place for actual delivery is no more uncertain in the one case than in the other.

I am inclined to the opinion that if the landlord fails to designate a place for the payment of the rent, the tenant may pay or tender it at either place mentioned for that purpose in the lease, but that question cannot be disposed of in this case, where no tender of any sort was attempted. Entertaining the foregoing views, I am of opinion that there was no error in the refusal to nonsuit the plaintiff.

The defendant's first request was properly refused, because it assumed that it was proved that the defendant had requested the plaintiff to name a place where he should pay the rent, and that the plaintiff had refused to do so. This was upon the evidence at most a question of fact for the jury, the witness who proved the conversation being unable to say whether the conversation related to this farm or to another, and the defendant having on that question the burthen of proof upon him.

The second request is liable to the same objection; it assumed a proposition of fact to be proved, as to which at most the defendant had a right to ask to go to the jury.

The direction as to interest was right according to *Van Rensselaer v. Jewett*, (2 Coms. 135.)

The observations already made as to the motion for a nonsuit, dispose of all the points which can arise upon the exception to the judge's direction to the jury to find a verdict for \$441.48, except upon the ground that there was a question of fact for

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the jury to pass upon as to whether the plaintiff had waived the performance of the services. It does not appear that any such question was made at the trial. The defense seems to have been rested upon points of law. If the defendant desired to go to the jury, he should have called the judge's attention to it at the trial.

SILDEB, J. The question raised in this case in regard to the allowance of interest upon the rent, must be considered as conclusively settled by the cases of *Lush v. Druse*, (4 Wend. 813,) *Van Rensselaer v. Jones*, (2 Barb. S. C. R. 643,) and *Van Rensselaer v. Jewett*, (2 Coms. 185.)

It is insisted on the part of the appellant, that there were two questions of fact which ought to have been submitted to the jury, viz: 1. Whether the plaintiff had waived the services reserved by the lease; and 2. Whether the defendant had requested the plaintiff to designate a place for the payment of the rent, and had offered to pay the same upon a place being appointed.

With respect to the first of these questions, it will be seen, that it was rendered immaterial, by the deduction from the amount of the plaintiff's claim, of all that was included for non-performance of services, subsequent to the supposed waiver. This was giving to the defendant the full benefit of all he could claim from the waiver, if found by the jury. There could therefore be no necessity for submitting this question. In regard to the second question, it is plain that it was wholly immaterial considered by itself, whether the defendant had requested the plaintiff to appoint a place of payment or not, or whether the latter had declined or not; this could only be material in connection with other facts of which there was no proof. Because, if the designation of a place of payment by the landlord, was a condition precedent to the obligation to pay the rent, as claimed by the defendant, then, as no such designation was proved, the plaintiff should have been nonsuited, without re-

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gard to the question whether he was called upon to appoint a place or not. If, on the other hand, the judge was right in holding this not to be a condition precedent, then the defendant was not absolved from his obligation to pay, by the omission or refusal of the plaintiff to appoint a place. Evidence of such a refusal might in one view of the case be material, in connection with proof of a tender of the rent at some place not appointed; but in no other respect could it be of any importance; and as no such proof was offered, the judge was right in disregarding the question. It could not have affected the result if expressly found by the jury.

The case is reduced therefore to the single question, whether the obligation of the defendant to pay the rent reserved by the lease, was dependent upon the prior designation of a place of payment, by the plaintiff.

The clause in the lease upon which this question arises, is as follows: "Yielding and paying therefor, unto the said party of the first part, his heirs, executors, administrators or assigns, yearly and every year on every first day of January, during the term hereby demised, *at the North river, within the county of Columbia, or within the said lot No. 3, as the party of the first part shall from time to time direct*, the rent of twenty-five bushels of good, clean, merchantable winter wheat, of the first quality, four hens and two days' riding." This clause is followed by a covenant to "pay, fulfill, accomplish and perform, the rents and services before reserved."

When and where was the rent upon this lease to be paid? It will be found on looking into this subject that the law is particularly careful not to permit any omission or uncertainty in regard to the *mere place* of payment, to interpose any obstacle in the way of the due performance of the contract. It favors the punctual and prompt discharge of all obligations, and hence adopts such rules as will facilitate that object. In all cases, therefore, where the parties have failed expressly to stipulate as to the place of payment, the law either definitely fixes the



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place, or affords the means by which the obligor, by a proper observance of its rules, may ascertain and fix it. So universally true is this, that it may be safely assumed, that there are few cases if any, in which an obligation to pay, either in money, in goods or in services, is by its terms to be met upon a particular day, where the obligor may not, if he act with a due regard to the rules of law, discharge himself of the obligation *on that day*. It would be a great hardship were it otherwise, and were the debtor compelled to rest under the obligation, although ready and willing to pay.

In this case the obligation assumed is, to pay the rent upon "*every first day of January during the term,*" and the landlord has a right to designate the place of payment. But suppose he omits to do this, on or prior to the day fixed, what then is to follow? The consequences of holding that the designation of the place is a condition precedent, and that the rent cannot be paid until that is done, must, I think be, that unless the lessor appoints the place on or before the day, the rent is *forever gone*. Because otherwise, it would be in the power of the landlord to change the contract. By the agreement of the parties the rent is payable on a certain day; but if the lessor may omit to appoint the place of payment in time for that day, and afterwards designate it, he may make the rent payable whenever he chooses. This would be entirely repugnant to the settled rules in regard to contracts.

It is at least clear that the appellant, to sustain his defense, must maintain one of two propositions, viz: that the omission of the landlord, or at all events his refusal when called upon, to appoint a place of payment, worked a forfeiture of the rent; or, that the tenant might be subjected to the accumulation of the rent from year to year, without the power of discharging it.

But the law in my judgment would not tolerate the doctrine, either that the rent, for which the tenant is presumed to have received a full equivalent, is absolutely discharged and lost by the omission or refusal of the landlord to appoint a place to

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receive it, or that the tenant who has fixed a day certain for the payment, may be kept at bay and forced to wait, until the lessor chooses to make such appointment. All the analogies of the law are against this assumption. For instance: in case of a note or obligation payable in ponderous articles, such as lumber or iron; the creditor has a right to point out the place of delivery, and it is the duty of the debtor to call upon him to do so; but if he *omit or refuse* to name a place, the debtor is not thereby discharged, but must still pay. It is not, however, very definitely settled, what course the debtor is to take under such circumstances. Chipman, in his essay on contracts, after remarking, that the books, on account of the infrequency of such cases, afford no certain guide as to what is to be done, says, "Yet when such a case does arise, it must be a *reproach* upon the law, if it do not point out *the duty* of the debtor, *and enable him to do*, that which will legally discharge him from the contract." (*Chipman on Cont.* 26. See also *Barns v. Graham*, 4 Cowen, 452.)

So it may be said in this case, with even greater force, on account of the steady accumulation of the indebtedness, that it would be a "reproach upon the law" if it did not afford some means by which the tenant could relieve himself of the obligation. But I apprehend that no such reproach need rest upon our judicial system, as the whole difficulty consists in the want of a certain and fixed place of payment; and that is a difficulty which the law will be found in all cases to remove, by appointing a place for the parties, where they have omitted to do it for themselves.

If, then, we adopt the dictates of reason and justice, or the rules of law in analogous cases, we must conclude, that when the time arrived for the payment of the rent upon this lease, if the landlord failed to point out the place of payment, there was still some mode in which the tenant could legally perform his covenant. What then was that mode?

The question is, I think, sufficiently answered by the established rules on the subject. There is much less difficulty in

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such a case when the debt to be paid consists of rent, than when it arises upon an obligation at large ; because in the latter case, the place of payment when not fixed by the terms of the contract, depends upon a variety of circumstances, all of which are to be considered : whereas rent is a mere product or issue of lands, and on account of this connection, the law uniformly holds, that when no other place is fixed for the payment of rent, it is payable upon the land out of which it issues. (*Walter v. Dewey*, 16 *John*. 222 ; *Hunter v. Le Conte*, 6 *Cowen*, 728.)

I see no difficulty therefore in coming to the conclusion, that the rent in this case, until some other place was designated, was payable upon the demised premises ; and if so, it can need neither argument or authority to prove, that it was the duty of the tenant to pay or tender the rent upon the land, and that he would be in default if he omitted to perform this duty. This must of course follow, because the only obstacle to the payment of the rent being removed by the act of the law in fixing the place, the tenant is left without excuse for not complying with his covenant. It is the same in all respects as if the place was fixed by the contract, or by the act of the parties.

But we are not driven to rest our conclusion upon this deduction from general principles alone. It is amply sustained, I think, by direct authority. In the case of *Remsen v. Conklin*, (18 *John*. 447,) the reservation of rent in the lease was as follows : "Yielding and paying, &c. yearly, and every year, (after four years from the 1st of August, 1794,) upon the first day of February in every year, at such place in the city of Albany as the said parties of the first part, their heirs or assigns shall for that purpose, from time to time appoint, the yearly rent of ninety-two bushels, and four-fifths of a bushel of good merchantable winter wheat." The land leased was in Oneida county. The rent was suffered to remain in arrear for a number of years, and the executors of the lessor brought covenant against the assignee of the lessee. The defendant pleaded in bar that the plaintiff had not appointed a place in the city of Albany for the payment of the rent ; and

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to this the plaintiff demurred. The court sustained the demurrer, and Spencer, Ch. J. after remarking that it became the duty of the landlord, if he would have the rent paid in Albany, to appoint a place<sup>4</sup> and give notice to the defendant, adds, "and in case this appointment was not made and notice given, the consequence would be that the defendant would be absolved from delivering the wheat in Albany, *but still he would be bound to deliver it on the land*, for rent issuing out of land, when no place is appointed, is payable on the land, (1 *Inst.* 210, 211; *Bac. Abr. Tender, C.*) and hence it became necessary for the defendant to plead a tender, or a readiness to deliver the wheat upon the land."

It is true that this case, so far as it holds that the rent under the covenant in that lease, in default of the landlord to appoint a place of payment, was payable *upon the land*, was overruled in the subsequent case of *Lush v. Druse*, (4 *Wend.* 313,) which was an action of covenant upon a similar lease. It was there held that the parties having designated a place of payment at a distance of fifty miles from the land: to wit, the city of Albany, the rent could not in any event be payable upon the land, but must be paid *somewhere* in Albany. But it was also held, that the tenant was bound to seek the obligee to ascertain where he would receive the rent, and that if the landlord could not be found and no place was appointed, that the tenant might pay at any suitable place in the city of Albany; and it was assumed that he *must pay or make a tender* of the rent at some place.

Now it is plain, that the ground upon which the court in *Lush v. Druse*, departed from the decision in *Remsen v. Conklin*, viz: that the parties had, by the terms of their agreement manifested a clear intent, that the rent should be paid at a distance from the land, does not apply to the present case; because one branch of the alternative provision, as to the place of payment in this case is, that the rent is to be paid within lot No. three, in the manor of Livingston, which lot embraced the demised premises. It cannot be said therefore in this case, that the parties have agreed that the rent shall at all events be payable off the land. The case is therefore even stronger in favor

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Livingston against Miller.

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of the land itself as the place of payment, than if no place whatever had been named. Hence I am inclined to think that under the covenant in this case, it should be held as it was, and but for the peculiar terms of the covenant, would have been correctly held in *Remsen v. Conklin*, that the lessee had a right, if he received no notice of any other place, to tender the rent upon the land, without even calling upon the lessor to make an appointment.

But if it be held as was held in *Lush v. Druse*, (*supra*), that the tenant was bound to seek the landlord for the purpose of ascertaining where he wished the rent to be paid, it would not affect the result in this case. Because whether the landlord omitted, without being called upon, or refused when called upon, to designate any place, it was equally the right and the duty of the tenant, as clearly appears from the cases cited, to pay or tender the rent at such place as the law would designate ; which in this case, would no doubt be upon the demised premises.

In any view of the case, therefore, the defendant was in default, and the ruling of the judge at the circuit was in all respects correct. The judgment should be affirmed.

Judgment affirmed.

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The People *against* Fulton.

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THE PEOPLE, *ex rel.* FULTON and others, *against* FULTON and others.

The title to property acquired by a religious society incorporated under the general statute vests in the corporation.

While its real estate is under the control of the trustees, the legal possession is in the corporate body.

Proceedings under the statute for a forcible entry and detainer of a church owned by such society should be in the name of the corporation. Such proceedings cannot be sustained in the individual names of the trustees.

APPEAL from a judgment of the supreme court sitting in the county of Monroe.

E. Fulton and the other relators, in February, 1847, made a complaint before the first judge of the county courts, against William B. Fulton and eleven other persons, under the provisions of the revised statutes relating to *forcible entries and detainers*. (2 R. S. 505.) The complaint stated that W. B. Fulton and the others, on the 5th day of the same month, at, &c. made a forcible entry into the land and tenements of the complainants, "which they hold as trustees of the first congregational society of the towns of Parma and Greece, to wit, the church or meeting house and the appurtenances, about half an acre of land;" that they forcibly expelled the complainants from said church or meeting house and appurtenances "which they held quietly as the trustees of said religious society;" and that said W. B. Fulton and the others still held and detained the premises from the complainants.

The judge issued a precept for a jury, and directed notice to be given to the defendants according to the statute. An inquisition was made, by which it was found that the complainants were in the possession of the meeting house as trustees of the religious corporation until the defendants forcibly and with a strong hand entered and expelled them; and that they still keep them out.

The defendants sued out a *certiorari*, and the proceedings

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The People *against* Fulton.

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being returned to the supreme court, they severally traversed the inquisition. The cause was twice tried, the second trial being had before the Hon. Henry W. Taylor, in May, 1851. Upon this trial the plaintiffs offered to prove that the complainants, the relators, were five of the six trustees of the First Congregational Society of Greece and Parma, a religious society duly incorporated in 1824, under the statute providing for the incorporation of religious societies; that at the time of the entry by the defendants, the complainants as trustees of the society, were rightfully in the possession of the meeting house as fully and effectually as by the statute, trustees of religious societies could have the possession of the temporalities of a church; that the defendants forcibly entered the meeting house and ejected the complainants therefrom, and held and still continued to hold them out, though they had demanded the possession to be restored to them as such trustees; and that the other trustee was one of the disseizors.

The counsel for the defendants objected to the evidence thus offered, on the ground that proceedings of this character could only be instituted by the corporation, and that the trustees could not proceed in their own names: but if it could be done under any circumstances, it could only be done by or in the name of all the trustees, and not in the names of five out of six of them. The judge sustained the objection and nonsuited the plaintiffs; whereupon judgment was given against the relators for the costs, which was affirmed at a general term. An appeal was taken to this court.

*O. Hastings*, for the appellants.

*H. R. Selden*, for the respondents.

DENIO, J. The court below was clearly right in the judgment it came to in this case. Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate; and while the officers have it under their control or

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dominion, whatever possession they have is the possession of the artificial person whose agents they are. Although called *trustees*, they do not hold the property in trust for the corporation or the religious society. The name is simply the title of their office; and their position respecting the corporate property would be the same if they were denominated directors, or managers. Their right to intermeddle is an authority, and not an estate or title. They have no other possession than the directors of a bank have of the banking house. This would be so upon general principles relating to the legal nature of corporations, apart from the particular language of the act concerning religious corporations. By the 4th section of that act, however, the trustees are in terms authorized *by their corporate name and title*, "to hold and enjoy," among other things, all churches and meeting houses, and all estates, belonging to the society, as well as to sue and be sued. (3 R. S. 208, § 4, 2d ed.)

It is the person who has the legal right to the possession who is to institute the proceedings in the case of a forcible entry and detainer. If such person has an estate of freehold or for a term of years, that is to be stated in the complaint: if any other right of possession, that is to be stated. (2 R. S. 508, § 3.) If the complainants prevail upon the trial of the traverse, a precept is to issue to the sheriff commanding him to cause them to be restored and put into full possession of the premises, according as they were seised or possessed thereof before such entry. (*Id.* § 13.) These provisions are clearly inapplicable to the servants or agents of the owner of real estate, and to the officers and agents of a corporation where it is the proprietor. Although the proceeding is not a regular action, but partakes rather of the nature of criminal proceedings, it is still to be prosecuted by and in the name of the party whose legal right of possession has been invaded, and not by the individuals who may have been charged with authorities or duties respecting it. The judgment must be affirmed.

ALLEN, J. also delivered an opinion for affirmance.

Judgment affirmed.



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*Beers against Reynolds.*

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**BEERS *against* REYNOLDS & MAGINNIS.**

Where a limited partnership is dissolved by the agreement of the parties before the period fixed for its termination by the original certificate, it continues as to persons crediting the firm without actual notice of such dissolution, until the notice required by the statute has been filed, recorded, and published *for four weeks* as therein prescribed.

If any alteration be made in the capital or shares and the partnership be in any manner thereafter carried on, before the publication of the notice is completed, the special partner becomes liable as a general partner.

Accordingly where parties to a limited partnership agreed to dissolve it and caused notice of such dissolution to be filed and recorded, and commenced its publication, and the special partner at the same time sold his interest in the copartnership effects to the general partner, who secured the price by a mortgage on the effects and other property and a judgment, and continued the same kind of business, and afterwards and before the publication of the notice was completed, purchased goods of the plaintiff who had no actual notice of the dissolution; *Held* that the special partner was liable to the plaintiff as a general partner, without reference to the intent with which the dissolution took place and the mortgage and judgment were taken.

THIS was an action brought to recover of the defendants, Maginnis & Reynolds, the amount of a bill of goods sold by the firm of James H. Beers & Son, composed of the plaintiff and George W. Beers, on the 23d of April, 1848, and delivered to Maginnis.

The defendant Reynolds appeared and answered, and the cause was tried at the Niagara circuit before Justice Mullett.

On the trial it was proved that on the 16th day of July, 1847, the defendants formed a limited partnership pursuant to the statute, to carry on the tailoring business at Lockport in the county of Niagara during two years from its commencement, under the name of James Maginnis. Maginnis was the general, and Reynolds the special partner, and the latter contributed \$1000 towards the capital of the business. Prior to the attempted dissolution, James H. Beers & Son, who did business in New-York,

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*Beers against Reynolds.*

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dealt with the firm. On the 17th of April, 1848, the defendants agreed upon a dissolution of the copartnership, and on that day they signed and acknowledged a notice of dissolution, and caused the same to be filed and recorded in the office of the clerk of the county of Niagara, where the original certificate was recorded, and immediately thereafter commenced the publication of such notice in a newspaper printed in Niagara ~~county~~, and in the state paper, pursuant to section 24 of the statute "Of limited partnerships," and such notice was published once in each of said papers before the 23d of April. At the time of the agreement to dissolve, and on said 17th of April, Reynolds sold his interest in the copartnership to Maginnis for the sum of \$1500, and to secure the payment thereof the latter executed to Reynolds a chattel mortgage on the personal property which had belonged to the firm, and other property owned by him individually, and also executed to him a bond conditioned for the payment of \$1500 with interest, on demand, with a warrant of attorney, upon which judgment was entered the same day. On the 20th of October, 1848, an execution was issued upon this judgment to the sheriff of Niagara county, against Maginnis, upon which \$14 were made, and as to the residue the sheriff returned *nulla bona*. That on the 23d of April, 1848, Maginnis purchased of Beers & Son in New-York a bill of goods suitable for the tailoring business, to the amount of \$688,12; that the firm of Beers & Son was since dissolved, and George W. Beers had assigned his interest in this account to the plaintiff.

It was proved that on the said 17th of April Reynolds wrote a letter to James H. Beers, notifying him that the limited partnership was that day dissolved; that it was addressed to Beers at New-York, and deposited on the day it was written in the post office at Lockport. Evidence was given on the part of the plaintiff tending to prove that this letter was not received by the firm of James H. Beers & Son until a day or two after Maginnis had purchased and taken away the bill of goods, and that they had no notice of the dissolution until the receipt of this letter. It was proved that in September, 1848, the account in

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*Beers against Reynolds.*

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suit was presented for payment to Maginnis, and he admitted the amount was correct.

The justice before whom the cause was tried charged the jury, among other things, that the transaction of the 17th of April, between the defendants, consisting of the sale by Reynolds to Maginnis of his interest in the copartnership property and the giving by the latter of the mortgage and judgment, was a violation of the statute in relation to limited partnerships, and made Reynolds liable as a general partner as to all the creditors of the firm at the time, and all persons who became creditors of the firm afterwards without notice of the dissolution, *irrespective of the intent with which the dissolution took place and the mortgage and judgment were taken.* To this the counsel for Reynolds excepted.

He also charged the jury that if the plaintiff, at the time he sold the bill of goods in suit, had actual notice of the dissolution of the limited partnership, he could not recover against Reynolds. That if the plaintiff was entitled to recover, interest should be allowed on the amount of the account from the time it was presented to Maginnis. To this last the counsel for the defendant Reynolds excepted.

The jury rendered a verdict in favor of the plaintiff against both defendants for \$837,10, being the amount of the account and interest from the time it was presented to Maginnis. The defendant Reynolds having made a bill of exceptions, appealed to the supreme court sitting at general term in the eighth district, where the judgment was affirmed. He appealed to this court.

*F. L. Bowen*, for appellant.

*N. Dane Ellingood*, for respondent.

GARDINER, Ch. J. delivered the opinion of the court.

According to the original certificate acknowledged by Reynolds and Maginnis, the limited partnership between them was

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*Beers against Reynolds.*

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to continue for two years. The 24th section of the statute (1 R. S. 767,) expressly provides, that no dissolution by *act* of the *parties* shall take place, previous to the time specified in the certificate, until a notice shall be filed, recorded and published in the manner therein prescribed. The demand in controversy was contracted within the two years, in the firm name, and as the jury have found, without any knowledge, express or implied, on the part of the plaintiff, that a dissolution was contemplated by the copartners, previous to the time for that purpose fixed in their certificate. It appears by the bill of exceptions, that the firm had been a customer of the plaintiff, and was indebted to him at the time of the attempted dissolution. Under these circumstances it is obvious, that the partnership would continue as to the plaintiff, until actual notice of a dissolution, or a constructive notice of the same fact, given for the time, and in the manner prescribed by the statute.

That Reynolds was liable to the plaintiff, therefore, as a special partner, there can be no doubt. The more important question is, is he or can he be made responsible as a general partner?

It appeared upon the trial, that at the time of the attempted dissolution, and as part of the arrangement then made, Reynolds disposed of his interest in the concern to Maginnis, the general partner, for fifteen hundred dollars, and took by way of security, a chattel mortgage upon the copartnership effects, and upon the individual property of the vendee, together with a judgment for the same demand; that upon this judgment an execution was issued, upon which fourteen dollars was made by the sheriff, who in October following, made his return of *nulla bona* as to the residue. The learned judge instructed the jury, that this transaction made Reynolds liable as a general partner, as to existing creditors of the firm, and as to all those who became creditors, without notice of the dissolution, without reference to the intent with which the dissolution took place, and the mort-

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*Beers against Reynolds.*

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gage and judgment were taken. In other words, as I understand the charge, no intent to defraud creditors was essential to create this liability. I think that this instruction was justified by the language of the statute, under which the copartnership was formed. The twelfth section of the act, among other things provides, that every *alteration* in the nature of the business, or in the *capital*, or shares of the copartnership, from that specified in the certificate, shall be deemed a dissolution; and that every such partnership, which shall in *any* manner be carried on, after any such alteration, shall be deemed a general partnership.

That there was an alteration in the shares of the copartnership is manifest; since the whole interest of Reynolds, which included his contribution to the capital, was by this transfer turned into a debt against Maginnis, and secured to the special partner, by a specific lien upon the firm property, to the exclusion of the creditors of the copartnership, whether existing or subsequent. The partnership was subsequently, within the meaning of the statute, "carried on," because the debt in controversy was contracted in the usual course, without any notice, as we have seen, of the arrangement between the co-partners, or of a dissolution, either actual or constructive. Under the circumstances disclosed by the bill of exceptions, we are of opinion, that the plaintiff had an election, to consider the arrangement between the defendants, at the time of the attempted dissolution, as merely void, and enforce his demand against the firm, as if it had continued, as originally organized; or, to treat the transaction as a violation of the twelfth section of the statute, and charge Reynolds as a general partner; and this, irrespective of a design to defraud or injure the creditors of the firm. The act makes his liability to depend upon the carrying on of the copartnership, after an alteration in the shares of the partners in the capital, as a matter of fact, without regard to the motives which led to the arrangement.

There is no force in the exception to the ruling of the judge upon the question of interest. The goods were all purchased

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of the plaintiff by Maginnis, at the same time and for a price fixed by the parties. The debt was therefore liquidated, when contracted. No precise time of credit was given. When, therefore, after a reasonable time had elapsed, and the account was presented, and impliedly admitted, the defendants were in default for withholding payment, and interest was properly chargeable from the time of the demand. (2 *Comstock*, 185.)

The judgment of the supreme court should be affirmed.

Judgment affirmed.

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THE SCHENECTADY AND SARATOGA PLANK ROAD COMPANY  
*against* THATCHER.

It is not requisite to the incorporation of a plank road company under the general act, that the whole amount of the capital stock should be subscribed before filing the articles of association.

It is sufficient that stock to the amount of \$500 for every mile of the proposed road is in good faith subscribed and five per cent paid thereon.

The directors have authority to require payment of subscriptions for stock before the whole capital is subscribed.

A subscriber to the stock in a proposed company, who is present at the first election and is there elected a director and acts as one of the board, will not be permitted afterwards, in a suit against him by the company, to object to the validity of its organization on the ground that no notice of such election was given, and that some of the subscribers did not attend.

A person is liable to the company for the amount of his subscription, although after calls were made, and before they were payable, he assigned his stock to a responsible party and had it transferred to and an account opened with him on the books of the company.

The court will not reverse a judgment for an erroneous refusal to nonsuit where the defect in proof is supplied during the trial. *Per* JOHNSON, J.

It is not a defense to a subscriber to stock, who as a director of the company, voted for the resolution requiring payment of subscriptions and delivered to other subscribers notices thereof, that notice of the required payments was not given to him pursuant to the 89th section of the act.

Where a company was incorporated in 1848 under the plank road act of 1847,

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and the defendant then subscribed to its stock, and the company, by virtue of a subsequent act of the legislature, without his consent increased its capital and applied its funds to the construction of a branch road, not authorized by its original organization; *Held*, that the defendant was not thereby released from his subscription.

APPEAL from a judgment of the supreme court sitting in the fourth district.

The action was brought to recover a balance due on a subscription by the defendant for one hundred shares of plaintiff's capital stock, and was tried at the Schenectady circuit before Justice Willard, without a jury.

The plaintiff proved that on the 23d of Dec. 1848, the defendant with others subscribed a written instrument by which he agreed to take and pay for one hundred shares, at fifty dollars each, of the capital stock of a plank road company to be incorporated to construct a plank road from Schenectady to Saratoga Springs, five per cent thereof being paid down and the residue to be paid when called for by the directors of the corporation according to law.

The plaintiff's counsel read in evidence, (the same having been objected to in due season on the two grounds first specified on the motion for a nonsuit hereafter stated,) a duly certified copy of the articles of association of the plaintiff, and of subscriptions thereto and affidavit annexed; the articles were dated December 23d, 1848, and stated among other things that the company was formed to construct a plank road from Schenectady to Saratoga Springs; that the distance was 22 miles; that the capital stock was \$50,000, divided into one thousand shares of \$50 each, and that the defendant and eight others named "who had been duly elected by the subscribers," should be the directors of the company for the first year; the subscriptions annexed were for \$29,800 only of the stock, and among these was that of the defendant for one hundred shares; by a clause in the articles, the subscribers agreed to pay the amount of their subscriptions whenever called for by the directors; the affidavit annexed was made by the defendant and two other directors on

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the 26th of said December, and stated that they were directors, "that five per cent of the whole amount subscribed in said articles has been paid in in good faith in cash by the persons subscribing, which amount is at least five hundred dollars for every mile of the road intended to be built under the articles, and that the five per cent is in the hands of the treasurer of the company." It was proved that the plaintiff was conducting business as a company and receiving tolls, and had been since July, 1849; that the defendant was at the election of and one of the first directors of the company, and acted as superintendent from its organization, till in April, 1849; that on the 8th of March, 1849, the board of directors passed a resolution "that the treasurer issue a circular letter to the stockholders, setting forth the condition of the company as regards the contracts made and the prospect of the completion of the road, &c. and at the same time give notice that the following calls for the payment of instalments on subscriptions for stock are hereby made to meet these contracts, viz :

"1849, April 10, ten per cent.

" May 1, twenty "

" " 15, thirty "

" June 1, thirty "

" " 15, five "

and that the president sign said circular with the treasurer;" that the defendant was present at the meeting at which this resolution was passed, and voted for it; that defendant paid five per cent when he subscribed for the stock, and the ten per cent required on the 10th of April had been paid. It was admitted that the defendant transferred 50 shares of his stock to others, who had paid for the same. The plaintiff then rested.

The counsel for the defendant thereupon moved the court to nonsuit the plaintiff on the grounds, 1. That the articles of association showed that the whole amount of the capital stock was not subscribed before filing the same: 2. That the affidavit annexed to the articles did not show that the amount of capital stock required by the act of 1847, (*ch.* 210,) and the amendments



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thereto had been subscribed or five per cent on that amount had been actually paid in before filing the articles ; 3. That the plaintiff did not prove it was a corporation ; 4. That the resolution of the directors did not specify a place of payment, and that a notice of the calls for payments is not shown to have been served thirty days before the times when they were required, or properly served ; 5. That the calls for payments and notice thereof were not made or served as required by the 89th section of the act. The motion was denied, and the counsel for the defendant excepted.

The counsel for defendant offered to prove that at the time the call for the payment of the said instalments was made, the whole amount of the capital stock as fixed by the articles of association, had not been subscribed. This evidence was objected to by the counsel for the plaintiff as immaterial ; the same was excluded, and the counsel for the defendant excepted.

The counsel for the defendant offered to prove that no notice was given of the election for the first directors of said company, being that at which the directors named in the articles were elected, and that some of the subscribers for stock were not present at or notified of such election. This evidence was objected to as immaterial and excluded, and the counsel for defendant excepted.

The defendant proved that on the 20th of March, 1849, he transferred the fifty shares of stock, to recover the balance upon which this suit is brought, to one Boyd ; that the same were on that day transferred to Boyd on the books of the company, and a new account opened with him as to the same ; and that Boyd paid the instalment of April 10, 1849, but refused to pay the others.

The counsel for the defendant offered to prove that on the 9th of July, 1849, the plaintiffs, in pursuance of the act of the legislature, passed April 6, 1849, (*Laws of 1849, p. 374,*) decided to and did proceed to construct a branch to the road authorized in its articles of association and said subscription

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paper, and for that purpose increased its capital and applied its funds prior to the commencement of this suit; and that neither the defendant or Boyd ever consented thereto, or to the passage of said act of 1849 by the legislature. This evidence was objected to, excluded, and the counsel for the defendant excepted. After the defendant rested, the counsel for the plaintiff proved, that pursuant to the resolution of March 8, circulars signed by the president and treasurer of the company were made out, addressed to the stockholders, giving notice of the calls for payments as mentioned in said resolution, and stating that the amounts might be paid at the office of the company or remitted by mail to the treasurer, and that a package of these circulars was delivered to the defendant to be handed to the subscribers for stock residing on the line of the road, he volunteering to deliver them to such subscribers. The defendant in due season objected to this evidence, on the ground that it was not such notice as was required by the statute, and that there was no evidence that such notice was served on or sent him by mail. The objection was overruled, and he excepted. It was proved that no notice of said calls was published in any newspaper.

After the evidence was closed, the counsel for the defendant insisted that the plaintiff was not entitled to recover, for the reasons stated in the motion for a nonsuit. He also insisted that the transfer of the fifty shares of stock to Boyd, the entry of such transfer on plaintiffs' books and the payment of an instalment thereon by Boyd, discharged the defendant as to the subsequent instalments; he also insisted that in the resolution requiring payments no place where they should be made was specified; that the directors had omitted to publish notice of said calls in a newspaper, or to send notice of the same to the defendant as required by the act, and that for these reasons the plaintiff could not recover. The justice overruled the objections and decided that the plaintiff was entitled to recover the balance due upon the subscription for the fifty shares of stock transferred to Boyd, and ordered judgment in favor of the plaintiff for such

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amount, being \$2371,56. To which rulings and decision the counsel for the defendant excepted. The judgment was affirmed by the supreme court at a general term. The defendant appealed to this court.

*Wm. L. Learned*, for the appellant.

*P. Potter*, for the respondent.

PARKER, J. I cannot agree with the defendant's counsel, that it was necessary to the incorporation of the Schenectady and Saratoga Plank Road Company, that the whole amount of capital stock should be subscribed before the filing of the articles of association. The first section of the act under which the company was organized, (*Sess. Laws of 1847, p. 216.*) permits the subscribers to elect directors, and to subscribe and file the articles of association, "when stock to at least five hundred dollars for every mile of the road so intended to be built shall be in good faith subscribed, and five per cent paid thereon," &c. This has been so adjudged in this state, in the case of the *Hamilton and Deansville Plank Road Co. v. Rice*, (7 Barb. 166.) A subscription of the whole amount of stock has never been held a condition precedent to a legal corporate existence, except when it was made so by the act of incorporation. (6 Pick. 23; 9 id. 187; 10 id. 142; 1 Mood. & Malk. 151; 4 Eng. L. and Eq. 455.) That stock was subscribed, to the extent required by the statute, and that all the other preliminary steps were taken, was established in the mode required by the second section, viz. by an affidavit of three of the directors of the company, of whom the defendant was one.

Nor was it necessary that the whole amount of stock should have been subscribed, before calls of instalments could be made. The act not only makes no such requirement, but it expressly permits (§ 39,) the directors of any company incorporated, &c. to require payment of the sums subscribed to the capital stock, at such times and in such proportions as they shall see fit. It

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first authorizes an incorporation to take place in subscribing a certain amount; (§§ 1, 2,) and then in section 39 authorizes the directors to require payment of the "sums subscribed." The decisions, therefore, in the courts of Massachusetts, (6 *Pick.* 28; 9 *id.* 187; 10 *id.* 142; 6 *Cushing*, 50,) relied on by the defendant's counsel, are entirely inapplicable. The same amount of stock subscriptions which is necessary to the organization of the company, is all that is requisite, as preliminary to a call for its payment by instalments.

The court rejected the offer of the defendant to prove that no notice had been given of the first election of directors. I think this was properly rejected, on the ground that the defendant could not avail himself of a neglect to give notice to any other stockholder. The defendant himself was present at that meeting, and voted, and was elected a director. He has not suffered by an omission to serve notice, and he is not in a situation to object as to others.

I see no reason why the liability of the defendant on his contract was not full and complete. He cannot avail himself of the objection that it was without consideration. He made the promise to pay, not as a gratuity, but in consideration of the shares of stock he was to receive and his anticipated dividends. This subject is fully examined in the *Hamilton and Deansville Plank Road Co. v. Rice*, (7 *Barb.* 164.) Nor was it any defense that the defendant had sold his stock to Boyd. That did not release him from his express promise to pay the plaintiff.

It is claimed that the building of the branch road, without the consent of the defendant, released him from his subscription and that the evidence on this point should have been admitted. The general act of 1847, under which the corporation was organized, reserved to the legislature the right at any time to alter, repeal or amend that act. That power was exercised in 1849, (*Sess. Laws of 1849*, p. 374,) by an act amending the act of 1847 in several particulars, and among others, conferring the right upon the directors of any plank road company, with the written consent of persons owning two-thirds of the stock, and with the written

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consent of the majority of the inspectors, to construct branches to their main line, or extend their main line or change the route of their road or any part thereof. The defendant subscribed to stock under the original act, subject to the contingency that additional powers might be conferred or other changes made by an amendment of the law, and he stands now on the same footing as if his subscription had been made after the amendment of 1849. It was not offered to be proved that the building of the branch road was prejudicial to the defendant's interests, or to those of the corporation; nor was it pretended that there had been any fraud or breach of trust on the part of the directors of the corporation. The defendant's counsel seems to rely with much confidence on the case of the *Hartford and New Haven Railroad Company v. Croswell*, (5 *Hill*, 383;) but that was an extreme case, and the change was one by which the nature of the business to be transacted by the company was radically changed, and the decision was put expressly upon the ground that the change made after subscription was plainly prejudicial to the interests of the stockholders. It is not certainly every extension of the main line, or construction of a branch, or change of route subsequent to subscription for stock, that will discharge a stockholder from his express agreement to pay for his stock. The change made may be unimportant, or may be, and in most cases doubtless is, beneficial to the stockholders. And where it is not claimed to be prejudicial, and the character of the contract is not altered, there can certainly be no reason for allowing a dissatisfied stockholder to take advantage of it. None of the cases recognize the right of a stockholder to complain where he has not been injured. (2 *Watts & Serg.* 156; 2 *Penn. R.* 466; 10 *Barb.* 277; 2 *Russ. & M'lyne*, 470; 8 *Mass.* 270; 10 *id.* 385; 15 *Pick.* 363; 1 *N. Hamp.* 44; 2 *Am. Law Jour. N. S. No. 11, for May, 1850.*) The question was carefully considered in 10 *Barb.* 277, and in the recent case of *White v. The Syr. and Utica Railroad Co.*, 14 *Barb.* 559.)

The case before us is also plainly distinguishable from that of the *Hartford and New Haven Railroad Co. v. Croswell*, and

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the Massachusetts cases relied on by the defendants' counsel, in the controlling feature, that in these cases the legislature had not reserved the right to alter the charter of the company. In such case the assent of those interested was necessary to changes so great as were proposed.

I think none of the exceptions of the defendant were well taken, and that the judgment of the supreme court should be affirmed.

JOHNSON, J. The defendant's first objection presents the question whether the whole amount of the capital stock of a plank road company formed under the general act of 1847, must be subscribed before the company can be duly organized as a corporation. The 1st and 2d sections of the act in question (*Laws of 1847, ch. 210, p. 216*) furnish the answer, "that when stock to the amount of at least \$500 per mile shall have been in good faith subscribed and five per cent paid thereon, the subscribers may organize themselves into a corporation." In their articles of association they are to specify the amount of the capital stock and the number of shares of which it shall consist; but it is nowhere provided that it must all be subscribed at the time of organization. The other provisions of the same sections confirm this construction. The articles are to be filed in the office of the secretary of state, and thereupon the corporate body comes into existence. They are not however to be filed until five per cent on the amount of the stock subscribed thereto shall have been paid in cash; nor until an affidavit of at least three directors named in the articles is annexed to or indorsed on the articles, stating that the amount of capital stock required by the first section has been subscribed, and that five per cent on the amount has been actually paid in. The amount of capital stock required by the first section we have already seen to be "at least \$500 per mile of the road intended to be built." There is no expression in either section which favors the idea, that the whole amount of the capital stock must be subscribed before the corporation can be created.

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The second objection is not well taken. The affidavit of the three directors does show not only that the amount subscribed to the articles is at least \$500 per mile of road intended to be built, but also that five per cent on the whole amount subscribed had been in good faith paid in, in cash.

The foregoing objections were also made the grounds of a motion for a nonsuit, which, so far as relates to those objections, was properly denied.

Some other grounds for that motion were also stated. 1st. That there was not sufficient evidence of the corporate existence of the plaintiff; and 2d. That the proceedings of the company in making and giving notice of the calls sued for had not been such as to enable them to recover.

As to the first ground, the third section of the act provides that a copy of any articles of association filed in pursuance of the act, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state or his deputy, shall in all courts and places be presumptive evidence of the incorporation of the company and of the facts therein stated. The legislature certainly has power over the law of evidence, and has as certainly exercised that power in this section, by making the production of the certified copies of the papers mentioned presumptive evidence of the incorporation of the company. That was sufficient evidence of the corporate existence of the plaintiff, until it should be rebutted by proof on the defendant's part.

As to the second ground before mentioned, it appears that the board of directors made the calls by resolution on the 8th of March, 1849; that the defendant was then one of the directors, was present and voted for the resolution. The resolution directed the treasurer to issue a circular letter setting forth the condition of the company as regards contracts made, &c. and at the same time to give notice that calls for the payment of instalments on subscriptions for stock were thereby made to meet the contracts mentioned, and that the president sign the circular with the treasurer. The amount of the calls and the times of payment

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were specified in the resolution. No evidence had been given when the objection under consideration was taken, of any other notice to the defendant, of these calls, than that which he had received by being present at the time of its adoption. The objection is raised upon § 39 of the act, which enacts that the directors of any company incorporated under this act may require payment of the sums subscribed to the capital stock, at such times and in such proportions and on such conditions as they shall see fit, under the penalty of the forfeiture of their stock and all previous payments thereon, and they shall give notice of the payments thus required, and of the place and time when and where the same are to be made, at least thirty days previous to the payment of the same, in one newspaper printed in each county in or through which their road is located, or by sending such notice to such stockholder by mail, directed to him at his usual place of residence.

At a subsequent stage of the case, the plaintiffs gave in evidence printed notices of the calls signed by the president and treasurer, in pursuance of the foregoing resolution, which notices specified that the payments were to be made at the office of the company or remitted by mail to the treasurer, and also proved that the defendant volunteered to deliver notices to the persons along the line of the road, and that a package of said notices was sent and delivered to him for that purpose. If the proof was insufficient when the nonsuit was moved for, and the defect was afterwards supplied, a new trial would not be granted on account of an error thus afterwards obviated. Taking all the proof on the point together, I think it was shown that the defendant had sufficient notice of the calls, to charge him. Personal service of due notice is clearly more advantageous to the defendant, than either an advertisement in a newspaper or a notice sent by mail. That he received, in addition to the knowledge on the subject derived from his personal participation in the passage of the resolutions. The section does not require the place of payment to be specified in the call for payments but only in the notice of the calls, and the resolution was authority to the treas-



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urer and president to make the instalments payable at the office of the company, it specifying no different place. Upon the whole case, therefore, if notice to a director personally present and joining in making the call is necessary, the evidence shows that the defendant had sufficient notice to render him liable.

The defendant was properly precluded from showing that no notice was given of the first election of directors, and that some subscribers were not present at the election. He was present, signed the certificate which states that he and eight others had been duly elected by the subscribers to be directors for the first year and until others should be chosen, and swore in the affidavit filed in the secretary of state's office that he was a director. After this and after the company had gone into operation, he was not at liberty to controvert the fact of the regularity of its proceedings in becoming incorporated. If the question could be opened at all, it could, I think, only be inquired into upon *quo warranto*.

Whether the defendant, after a transfer of his shares in good faith to a solvent person, remained liable for calls made before the transfer but becoming payable afterwards, depends upon the statute and his agreement. His agreement was to pay to the company the amount of his subscription when called for by the directors. The statute does not as is sometimes the case authorize calls upon "stockholders" merely, but gives power to require payment of the sums subscribed, without specifying the persons from whom payment may be so required. I think that from subscribers they have a right to require payment according to their agreements, and that this liability can only be extinguished in those modes in which ordinary liabilities to pay money are extinguishable. In order to dispose of this case it is not however necessary to go so far; for here the calls were actually made before the transfer.

The remaining question in the case relates to the effect upon the defendant's liability of the construction by the company of a branch road under the act of 1849, (*ch.* 250.) That among other things provides that the directors of any plank road company

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formed under the general law before mentioned may, with the written consent of the holders of two-thirds of the stock and of a majority of the inspectors, construct branches to their main line, or extend their main line or change the route of their road. This act took effect as a law, April 26th, 1849. Prior to that time the defendant had transferred his stock. He was not then a director or stockholder in the company. In July, 1849, the directors, under the act above mentioned determined to construct and commenced the construction of a branch road, and it was offered to be proved that neither the defendant nor Boyd his transferee had assented to the building of such branch road.

The first section of the act of 1847 subjects the corporations founded under its provisions to the 3d and 4th titles of chapter 18 of the first part of the revised statutes. One of these is that the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature. This condition is thereby engrafted upon the original constitution of companies formed under the act. The subsequent act was passed and operates under that reservation of power to the legislature. The corporate property is subject to that power, by reason of the assent to its exercise, implied from and by an organization under the act which reserves it. Every one who enters into such a company is aware of the reservation of the power and of the possibility of its exercise and trusts, as in many other matters he must trust, to the wisdom and justice of the legislature that this power will not be abused. In the *Hartford and New Haven Railroad Co. v. Croswell*, (5 *Hill*, 383,) and in the cases there cited as holding the same doctrine, the legislature had reserved no such power, and the acts there involved were held to violate the provision of the constitution of the United States, which forbids the enactment by a state of any law impairing the obligation of contracts. The persons who contract to take shares in a company under such an act, contract subject to the same reservation of power. The courts are bound to read their agreement with the legislative condition. They agree to take and

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pay for the shares for which they subscribe, subject to the power of the legislature to alter or repeal the charter of the company, and it does not lie in their mouths to complain that the power has been exercised.

The judgment below should be affirmed.

Judgment affirmed.

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**THOMPSON and others *against* THE MAYOR, &c. OF NEW-YORK and others.**

Under the act of 1806, which enacts that in all cases where "the mayor, aldermen and commonalty of the city of New-York, shall think it for the public good to enlarge any of the slips in the said city, they shall be at liberty and have full power so to do, and upon paying one third of the expense of building the necessary piers and bridges, shall be entitled not only to the alpage of that side of the said piers which shall be adjacent to such slips respectively, but also to one-half of the wharfage to arise from the outermost end of the said piers," the corporation has the power to build piers, and to extend them into the river for the purpose of enlarging the slips.

The word *slip* in this act designates the intermediate space formed by the docks.

Within the meaning of this act a slip may be enlarged by building and extending piers into the river.

It is not requisite that the piers on each side should be extended equally or at the same time.

Where the corporation of New-York was the owner of and entitled to receive one-half of the wharfage arising from the end of a pier, and annually demised and let the same and the right to collect and receive it to lessees; *Held*, that it was not sufficient to establish title thereto by prescription in the owner of the other one-half, that he had collected and appropriated to his own use the whole wharfage during thirty years, without obstruction from the city or its lessees.

Under such circumstances, there should be proof of knowledge by or notice to the corporation of an adverse claim and enjoyment to establish title by prescription against it.

This suit was commenced in the late court of chancery, and was transferred to the supreme court, and thence to the superior court of the city of New-York.

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Thompson *against* The Mayor, &c. of New-York.

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The bill was filed in 1844 to restrain the defendants, the city of New-York and its lessees, from collecting or receiving one-half of the wharfage accruing from the outermost ends of piers Nos. 19 and 20, in the East river, upon the grounds; 1st, 'that the corporation of the city of New-York never had any right to the wharfage; 2d, that if it ever had such right, it had lost it by the adverse user and enjoyment by the plaintiffs and those under whom they claimed. The corporation claimed and insisted, that it was the owner of and entitled to collect and receive one-half of said wharfage.

The cause was brought to hearing on pleadings and proofs in the superior court, before Justice Campbell, who decided that the corporation had originally title to one-half of the wharfage of the outermost ends of said piers; and to the end that the plaintiffs might, if they could do so, give further evidence of adverse user and enjoyment by them, or of title by prescription, ordered the following issues to be tried by a jury, viz: first, whether the plaintiffs in this case, and those under whom they claim, had acquired by prescription an exclusive right to the whole of the wharfage at the outermost end of a certain pier, known as pier No. 19, East river, being on the easterly side of the slip, at the foot of Maiden lane, in the city of New-York, previous to the 7th day of July, in the year 1840; and second, whether the said plaintiffs, and those under whom they claim, had acquired by prescription an exclusive right to the whole of the wharfage at the outermost end of a certain pier, known as pier No. 20, East river, being on the westerly side of Burling slip, in the said city, previous to the 21st day of March, in the year 1839. For a full statement of the pleadings and proofs before, and decision by Justice Campbell, see 8 *Sandf. S. C. Reports*, 487.

The above issues were tried in the superior court before Chief Justice Oakley and a jury.

The evidence on these issues on said trial was the same in substance as the depositions, &c. taken in the cause and used on the hearing before Justice Campbell, above referred to. It showed that during some thirty years prior to 1844, the plaintiffs and their

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grantors collected the whole of the wharfage arising from the outermost ends of said piers without obstruction from the corporation or its lessees. That during the same period, the corporation of New York was accustomed to and did, from year to year, sell at auction to the highest bidder, and lease pursuant to such sale, the wharfage, slippage, dockage, crannage, and other emoluments arising from, and of right payable at the wharves, piers and slips belonging to it, within certain prescribed bounds, and called "a district," which included the premises in question. That at such sales, the wharves, piers and slips belonging to the city, and proposed to be leased within the district, were designated on maps prepared by the city and exhibited at the sales, representing the same, and that on these maps the one-half of the outermost ends of piers 19 and 20 were represented as belonging to the city, and the wharfage accruing therefrom as payable to it and its lessees, and that such leases gave to the several lessees the right to collect the one-half of the wharfage accruing from the outermost ends of said piers, as against the city.

The court charged the jury among other things, that the landlord could not be prejudiced by the acts of the tenants; that to establish a title by prescription, notice to the owner that the property is held adversely necessary.

The jury found for the plaintiffs on both issues in the language of the issues.

The cause was brought to hearing at a general term of the superior court in 1851, on the pleadings, proofs, and the verdict of the jury, and a decree was thereupon made, dismissing the bill of complaint with costs.

From this decree the plaintiffs appealed to this court. The evidence on the questions is sufficiently stated in the opinion.

*A. L. Robertson*, for the appellants.

*R. J. Dillon*, for the respondents.

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EDWARDS, J. delivered the opinion of the court.

The plaintiffs in this suit seek to restrain the defendants from collecting or receiving one-half of the wharfage of the outermost ends of the piers Nos. 19 and 20, in the East river. The grounds upon which they place their claim are, 1st, that the corporation of the city never had any right to the wharfage ; and 2d, that if it ever had such right, it has lost it by the adverse user, and enjoyment of the plaintiffs. and those through whom they claim.

It appears from the pleadings and proofs, that pier No. 19, forms the easterly side of the slip at the foot of Maiden lane, formerly called Flymarket slip ; and that pier No. 20 forms the westerly side of Burling slip. A portion of these piers was built in the year 1809, the corporation of the city paying one-third, and the adjoining proprietors paying two-thirds of the expense. The remainder of the piers was built in the years 1839 and 1840, and the expense was borne in the same proportions as it had previously been. The Montgomerie charter, which was granted in the year 1780, gave to the mayor, aldermen and commonalty of the city, "the right, benefit and advantage of all docks, wharves, cranes, and slips or small docks, within the city, with wharfage, cranage, and dockage, and all issues, rents, profits, and advantages arising, or to arise, or accrue by, or from all, or any of them." (*Kent's Charter*, 143, § 87.) The same charter also granted to the city the land under water, extending four hundred feet from low water mark into the East river. This gave to the city a large number of water lots, many of which it granted to individuals. In the year 1798, the corporation of the city applied to the legislature for authority to run a street seventy feet wide, in front of these water lots, to be known as South-street, which was to form the extreme boundary of the city upon the East river. The legislature granted the authority which was asked ; and, as a part of the original plan, it also authorized the mayor, aldermen and commonalty, to direct piers to be sunk and completed, at such distances, and in such manner, as they in their discretion should

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think proper, in front of South-street, at the expense of the proprietors of the lots lying opposite to the places where such piers should be directed to be sunk; and, on noncompliance, the corporation was to be at liberty to make the piers, and to receive the wharfage to its own use. (2 *Kent & Rad.* 126, *preamble and* § 1, *Act of 1798.* 4 *Lor. & And.* 459, §§ 3, 7, *Act 1801.*)

On the 1st of June, 1801, the mayor, aldermen and commonalty passed an ordinance, by which they ordered the respective owners of lots fronting and bounded on South-street, from Wall-street slip to the Fly Market slip, to make a pier on the north-east side of Wall-street, and complete it according to the directions therein given; in doing which the corporation was to grant the pier to the owners of the respective lots; "reserving in the grant the exclusive right to the corporation of the city, of wharfage, and slippage on the side of the pier adjoining a public slip." The proprietors of the lots denied the right of the corporation to make any such reservation, and they collected the whole of the wharfage, including what was called the slippage. In order to test this right, a suit was brought against one of them, by the corporation, and it was held that the corporation had no right to the wharfage. The court in giving their opinion say that "the corporation can have no such right, inasmuch as the land on which the pier is erected was never granted to them, nor was the soil under the water where the vessel lay, for which this wharfage was paid. The corporation can only grant as attorneys of the public, in case piers are sunk. That this is to be done under certain restrictions and regulations, means, not that they shall have a right to receive the wharfage to themselves, which is to be theirs only in case of default in the owners of the lots, in sinking piers, but that they are to regulate in what manner the right to wharfage shall be enjoyed." (*Corporation v. Scott*, 1 *Caines*, 543.)

After this decision was announced, and in the year 1806, the legislature passed an act, which provided that in all cases where the mayor, aldermen and commonalty shall think it for the public good to enlarge any of the slips of the city, they shall be at

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liberty, and have full power to do so, and upon paying one third of the expense of building, the necessary piers, and bridges, shall be entitled, not only to the slippage of that side of the said piers which shall be adjacent to such slips respectively, but also to one-half of the wharfage, to arise from the outermost end of the said piers. (4 *Web. & Skin.* 514, § 12.) It is under this provision of the statute that the defendants contend that they are entitled to one-half of the wharfage of the outermost ends of the piers in question. The plaintiffs, on the contrary, contend that the building and extension of the piers, did not constitute an enlargement of a slip, and that hence, the proprietors of the adjoining lots are entitled to the whole of the wharfage. There was some question made upon the argument as to the meaning of the word *slip*. The *Montgomery Charter* speaks of "small docks or slips," as if the two terms were synonymous. In the case above cited, the court say that "a slip is an opening between two pieces of land or wharves." And in the act of 1813, reducing the laws relating to the city of New-York into one act, provision is made for *filling up slips*. (2 *R. L.* 1813, p. 445, § 267.) The word has undoubtedly been used in two senses, that is, as designating the docks which form the intermediate space, and also as designating the intermediate space formed by the docks, but most generally in the latter sense, especially of late years, and it is clearly so used in the act of 1806. But it is said that there cannot be an enlargement of a slip, unless the piers on each side are equally extended at the same time. There is nothing in the act which shows that the legislature intended that such a narrow construction should be adopted, and it would be doing violence to language to say that the intermediate space is not enlarged, where one of the sides of a slip is extended, although the other may not be extended in an equal proportion. Besides, the act was passed after the decision in the case of *The Corporation v. Scott*, and if not passed in reference to that decision, it was certainly passed with knowledge of the claims which had been set up, and of the questions which had been decided in that case. But there



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is another reason why the building of the piers in question should be regarded as the enlargement of a slip, which seems to me conclusive, and that is, that the mayor, aldermen and commonly paid one-third of the expense of making the piers. This shows that they must have proceeded under the act of 1806, and the adjoining proprietors acquiesced in their proceedings. The ground upon which the state allowed piers to be made upon the outside of South-street was not that individuals might be benefited, but because the public good required it. They gave the privilege to the proprietors of the adjoining lots in the first instance, not on the ground of any right in them, but in the exercise of a spirit of fairness and equity, and of a just liberality on the part of the sovereign authority towards the citizens. In the case above cited, it was said by the eminent counsel who represented the corporation, that the outside of all public slips had been constantly reserved in the corporation grants, for the sake of convenience to the city, that its supply by market boats might not be impeded. And this, undoubtedly, explains the distinction which was made by the legislature in favor of the corporation, between ordinary piers and piers which enlarged a slip. The right to receive the slippage, and the half of the wharfage at the end of the piers, was given to the corporation, not for the mere arbitrary reason that it enlarged a slip, but because it enlarged a slip which had been granted to the corporation by its charter, and which it had reserved to itself, and of which it was still the proprietor.

The plaintiffs next contend that even if the defendants had become entitled to one-half of the wharfage at the end of the piers, as having been built under the power of enlargement of slips, and thereby became tenants in common with the plaintiffs, or those under whom they claim, yet that they were ousted from such tenancy in common, or must be presumed to have released it, by the adverse exclusive receipt of the wharfage by the plaintiffs and their grantors, from the time of the building of the piers to the making of the additions, in the years 1839 and 1840. Whether the right set up by the plaintiffs is one of such a

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character that it can be acquired by adverse user, and whether; if so, the plaintiffs have shown one adverse for a sufficient length of time to bar the claim of the defendants, I do not think that it is necessary to inquire. For the purposes of this case I shall assume the affirmative of both propositions. But it appears from the proofs that during the whole of the period in which the wharfage was received by the plaintiffs, and those under whom they claim, the interest of the corporation in the piers had been leased to individuals, and there has been no time, during which it was not so leased, and there is no evidence whatever from which it can be inferred that the corporation knew that any person had received wharfage in contravention of its rights. There is no proof of actual knowledge on the part of the corporation, and the receipt of wharfage is not, of itself, an act of such a character as would authorize the presumption of knowledge.

When this case was before the special term of the superior court, the justice before whom it was tried ordered two issues to be framed, and tried by a jury. This seems to have been done for the purpose of enabling the plaintiffs to give further proof of knowledge on the part of the corporation, than had been given in the trial before him. When the issues came on to be tried the proof was essentially the same as that which had been given at the special term, and the jury found that the plaintiffs and those under whom they claim had acquired an exclusive right by prescription to the whole of the wharfage. It seems to me that the issues as framed were not of such a character as should have been submitted to a jury. They were not strictly issues of fact. But whether they were or not, the verdict of the jury was not authorized by the evidence, and the court below very properly disregarded it.

The judgment of the superior court should be affirmed.

Judgment accordingly.

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*Bishop against Bishop.*

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*BISHOP against BISHOP.*

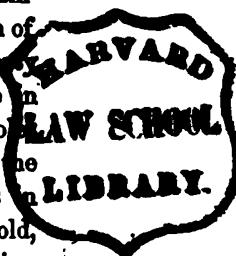
Poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, are a part of the real estate.

ACTION upon a note executed by the defendant to the plaintiff.

The defendant in his answer alleged, that in 1844, Lyman Bishop executed to one Blackman, a mortgage upon his farm, and subsequently planted upon it a hop-yard, in which the hop poles thereafter mentioned were used. That in 1849, Lyman Bishop died owning the farm, hop yard and poles, and while the latter were used in the yard for growing hops. That the plaintiff was appointed his executrix, and as such, she, on the 8th of November, 1849, sold the said hop-poles, as personal property belonging to the estate, to the defendant, and that the note in suit was given for the price thereof; that at the time the poles were so sold and purchased, "they had been taken down for the purpose of picking the hops therefrom, and were in heaps in the hop-yard, and not permanently severed from the freehold, but only with the view of being re-set in the season of growing and raising hops, and that they were indispensably necessary for the growing and raising of hops;" that after said sale, and in March, 1850, the farm was sold under the mortgage to Blackman, and purchased by one Nichols, the hop-yard and poles then being upon the same; that the poles were a portion of the real estate, and that Nichols by his said purchase acquired title to the same, and that therefore the consideration of said note had failed.

To this answer the plaintiff demurred, on the ground, that upon the facts in the answer stated, the hop-poles were personal property, and not fixtures, or attached to the real estate as a part thereof, and that title to the same passed by the sale to the defendant, and was not acquired by the purchaser of the farm.

The cause was heard by Justice Mason at special term, who



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overruled the demurrer and ordered judgment for the defendant; the judgment was affirmed by the supreme court in the sixth district. The plaintiff appealed to this court.

*George W. Sumner*, for the appellant.

*Southworth & Pritchard*, for respondent.

GARDINER, Ch. J. The only question presented in this case is whether the hop-poles, at the time of the sale to the defendant, were personal property, or to be deemed part of the realty. This question, I think, is settled by the facts stated in the answer, to which the plaintiff has demurred. If hop-poles can constitute a portion of the real estate, the defendant acquired no title to those purchased by him, conceding the truth of the answer. Assuming, as we must, the truth of the facts alleged by the defendant in his answer, the hop-poles were, at the time of the sale, a part of the realty. Of course, no title passed to the purchaser, and the note in question was wholly without consideration.

The root of the hop is perennial, continuing for a series of years. That this root would pass to a purchaser of the real estate, there can be no question. The hop-pole is indispensable to the proper cultivation of this crop. It is distinctly averred, and admitted, that the poles belonged to the yard upon these premises, that they were used for the purposes of cultivation, and were removed from the place where they were set, in the usual course of agriculture, with a view to gather the crop, and without any design to sever them from the freehold; but, on the contrary, with the purpose of replacing them, as the exigency of the new growth required. In a word, they were to be permanently used upon the land, and were necessary for its proper improvement. If the poles had been standing in the yard at the time of the sale, all admit, that they would have formed a part of the realty. But by being placed in heaps for a temporary purpose, they would not lose their distinctive character, as

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appurtenant to the land, any more than rails, or boards, from a fence in the same condition, would become personal property. Indeed, the case cannot be distinguished from *Goodrich v. Jones*, (2 *Hill*, 142,) where it was held that manure in heaps in the yard, and that fences, constitute a part of the freehold; and where the materials of which the fence is composed were temporarily detached, without any intent to divert them from their original use, it would work no change in their nature.

The opinion, in the case cited, was pronounced by Justice Cowen, who was himself an advocate for the doctrine of corporeal annexation, as being in general, the true criterion of a fixture. (*Walker v. Sherman*, 20 *Wend.* 655.) But all that was claimed by the learned justice, in his elaborate opinion in *Walker v. Sherman*, was that the chattel should be "habitually attached to the land, or some building upon it." It need not, he adds, "be constantly fastened." I think, according to this principle, that hop-poles which are put into the ground every season, and continue there until they are removed to gather the crop, and which are designed to be thus used, in the same yard, for the same purpose, until they decay by lapse of time, may without impropriety be considered as "habitually attached to the land," although "not constantly fastened to it."

The judgment of the supreme court should be affirmed.

EDWARDS, ALLEN, PARKER and SELDEN, Js. concurred.

DENIO, J. (dissenting.) The only question in this case is, whether the hop-poles which formed the consideration of the note on which the action was brought were real or personal property. The owner of the farm on which they were used mortgaged it, and died. The plaintiff, who was executrix of the mortgagor, sold the hop-poles and took the note in question for the price. The mortgage was then foreclosed, and on the sale the mortgaged premises were purchased by a stranger. The defendant, who purchased the hop-poles and gave the note, maintains that it was given without consideration, the plaintiff, as he

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*Bishop against Bishop.*

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insists, not being the owner of, and having no authority to sell the hop-poles.

The question virtually arises between the vendor and vendee of the land; for the purchaser under the foreclosure occupies the position of a purchaser of the land who has received a conveyance from the owner, and the defendant as purchaser of the hop-poles represents that owner; and by his purchase he acquired the same rights which he had and no others. This is the most unfavorable position in which such a question can be presented, for the party who claims the property as personal chattels. None of the distinctions which have been allowed in favor of tenants for a term against their landlords, or tenants for life against the remainder-man, or reversioner, or of executors against the heir, where the subject was erections made for the purpose of trade or manufacture, prevail here. If the hop-poles were annexed to the land in such a manner as to become fixtures for any legal purpose, the executrix had no interest in or title to them.

We are allowed to know judicially what every person out of court knows, that hop-poles are not permanently attached to the land. The cultivator provides himself with a supply of them, and when the root of the hop, which is perennial, shoots forth in the spring, these poles are set up perpendicularly in the earth, for the vine to entwine itself around. When the crop is mature the poles are taken down and stripped of their burthen, and set up in stacks, to be again used in the same manner the next year. The question is whether this is such an affixing to the land, as to change the character of the poles from that of personal property, which they bore when brought into the field, into real estate. To convert personal chattels into real property by force of the law of fixtures there must in general be a permanent corporeal annexation of the chattel to the land, or to something which is itself annexed to the land. Without going over the cases, which are numerous and were elaborately reviewed by the late justice Cowen, in giving the opinion of the supreme court in *Walker v. Sherman*, 20 Wend. 636,) I am satisfied with the conclusion at which that court arrived, that nothing of a nature personal in it-

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self will pass by a conveyance of the land, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually attached to the land or some building upon it. (*Id.* 655 ; and see *Freeland v. Southworth*, 24 *id.* 191.) Now although the ends of these poles are annually inserted in the ground, they are as often taken out, and for the greater part of the year they are in no manner fastened to the earth, but are entirely movable. The purpose for which they are set up is temporary on each occasion, though it is annually recurring. It seems to me that they partake of the character of implements or utensils rather than of permanent fixtures. I am of opinion therefore that they did not become parcel of the realty by actual annexation. If they have acquired that character it is on account of some other relation which they bear to the land.

There is a class of cases in which chattels are held to be fixtures, without actual annexation, but they are considered as exceptions to the general rule, and depend upon peculiar circumstances which do not exist here. Besides the articles which pass under the denomination of *heir looms*, it is settled that the doors, windows, locks, keys and rings of a house, the fences upon farms and the manure about a barn yard will pass under a conveyance of the land. (*Walker v. Sherman*, *supra* ; *Amos & Fer. on Fixtures*, 183 ; *Middlebrook v. Corwin*, 15 *Wend.* 169 ; *Goodrich v. Ives*, 2 *Hill*, 142.) These cases of constructive annexation are placed upon the ground, that the inheritance cannot be enjoyed without the use of the things so considered as annexed ; and it is said that they are accessories necessary to the enjoyment of the principal. (See *Lawton v. Salmon*, 1 *H. Black.* 259, *n.*) I do not think hop-poles come within the reason of these cases. They would doubtless be convenient for the purchaser of the freehold, but not more so than the other farming implements in the use of the former proprietor. They are just as well adapted for use upon another hop farm as on this ; and the purchaser can supply himself with new ones as readily as with other necessary things for carrying on the agricultural operations of the farm.

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*Beal against Finch.*

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I am of opinion that the judgment of the supreme court should be reversed, and that judgment should be rendered in favor of the plaintiff.

JOHNSON, J. concurred with DENIO, J.

Judgment affirmed.

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*BEAL against FINCH and others.*

In an action for a tort against two or more, each defendant is a competent witness for his co-defendant.

As to what matters he may give evidence, discussed. *Per* PARKER, J.

In such an action the damages are not divisible; and should the jury erroneously assess different amounts against the defendants, the plaintiff should have judgment against all who are convicted, for the largest amount found against any one. *Per* DENIO and PARKER, J<sup>s</sup>.

THE plaintiff brought the action against Zachariah Finch and five others, to recover damages for an assault and battery alleged to have been committed by them upon him. The defendants put in separate answers, denying severally the complaint. The cause was tried in August, 1851, at the Delaware circuit, before Justice Mason and a jury.

After the plaintiff had given evidence, tending to sustain the action against all the defendants and rested, the counsel for the defendants Finch and John McKinnon, called Archibald McKinnon, another of the defendants, and requested and offered that he should be sworn as a witness on behalf of his said two co-defendants above named. The counsel for the plaintiff objected to his being sworn as such witness, on the ground that he was one of the defendants in the action; the said justice decided that he was not a competent witness for said two defendants or



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*Beal against Finch.*

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for either of them, and excluded him from being sworn on their behalf, and the counsel for said two defendants excepted. The counsel for the defendants respectively also offered each of the defendants, with one exception, as a witness for his co-defendants; they were respectively objected to by the counsel for the plaintiff on the ground that they were defendants in the action, and excluded by said justice, and the counsel for the defendants excepted.

The jury found a verdict against all the defendants except one; upon which judgment was entered. A bill of exceptions was made and three of the defendants appealed to the supreme court at general term, which sitting in the sixth district affirmed the judgment; they appealed to this court.

*A. & R. Parker*, for appellants.

*Sayre & Banks*, for respondents.

PARKER, J. This was an action for an assault and battery. On the trial at the circuit, in August, 1851, the defendants were severally offered as witnesses for the other defendants, but were excluded by the judge, to which decision the defendants severally excepted.

Under the late practice it was a great and acknowledged evil, that the plaintiff had it in his power in an action for a tort, by uniting several persons as defendants in one action, to deprive each defendant of testimony to which he would have been entitled, if sued separately. By such means, a plaintiff was often enabled to make out his case and put money in his pocket, when he had, in fact, no good cause of action against the persons sued. Suppose two persons, concerned in committing a battery, and a third person standing by as a chance spectator only, and taking no part in the transaction. This spectator being a disinterested witness, his testimony might be necessary to show who struck the first blow; and the two engaged might be indispensable

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*Beal against Finch.*

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witnesses to prove that the third person was merely a spectator and had nothing to do with the affray. Now, by suing all three together, the defendants were cut off from all such testimony, though each might have had a complete defense. The plaintiff might call as a witness some one concerned on his side in the affray, and it would take but little testimony to make out a *prima facie* case against the spectator. A supposed look or word of encouragement was enough to make him a principal: for the law was then as it is now, that the slightest evidence against a defendant was enough to require the question whether the defendant was properly joined to be submitted to the jury; and as it could not be separately passed upon, it was decided by the jury too late to improve either defendant as a witness for another. Many other cases of great hardship might be supposed, but it is only necessary to state one or two for the purpose of illustration. Suppose A. had sold and delivered his horse to B. and received from him the price, no other person being present except C. who had come with B. as a witness to the transaction. If, afterwards, A. sued B. and C. together in trover for the horse, he could have made out a *prima facie* case by proving he had owned and used the horse for a long time before, and that the defendants were seen coming together towards A.'s stable, and soon after going away together, B. leading away the horse with C.'s assistance. Before the code, the defendants were not permitted, as witnesses for each other, to explain the true state of the transaction, and the plaintiff would have recovered.

Again, suppose six persons, three on a side, engaged in a personal encounter, no other persons being present. The question to be ascertained on the trial would be, who was the first aggressor. Under the old practice, one person on one side could sue all three on the other side, and call his two confederates as witnesses, and they were necessarily the only witnesses in the cause. The plaintiff in such case had the benefit of the testimony of his two associates, and neither defendant could call his co-defendants as witnesses. The improbability of ascertaining

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*Beal against Finch.*

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the truth, under such circumstances, and the palpable injustice of excluding the defendants, are obvious. It was cruel injustice to a party to permit his adversary to disqualify his witnesses at pleasure. The law afforded a very inadequate protection to personal rights, when it suffered a plaintiff to place himself in a situation to call all his own witnesses and exclude all the witnesses of the defendant. Upon principle, it must be conceded that every man ought to have the right to be tried upon his own case alone, and to avail himself of all the witnesses who have any knowledge on the subject of the controversy.

It was obviously one object of the code to correct the evil I have pointed out, by enacting in § 897, (code of 1849,) as follows: A party may be examined on behalf of his co-plaintiff or a co-defendant, but the examination thus taken shall not be used on behalf of the party examined. The only restriction upon this right was that which excluded a party from testifying to matters in which he had a legal interest, and that is still retained. (§§ 898, 899.) This provision was generally regarded as having effected the desired change, and was almost universally acquiesced in by the courts. (8 *Barb. S. C. R.* 655; 10 *id.* 290; 5 *How. Pr. R.* 296; 4 *Sandf. S. C. Rep.* 616.) But even under this broad and seemingly plain provision, it was held in one case that no change had been effected, and that § 897 contemplated only a continuation of the equity practice. (*Munson v. Hegeman*, 10 *Barb.* 112.) And it became necessary to come into this court to correct the erroneous construction given to the statute, which was done at April term, 1853. That decision of this court, in which it is established that, in an action for tort against two or more defendants, each defendant is a competent witness for the other defendants, is precisely in point and decisive of the case we are considering, unless the law on this point has been changed since the adoption of the code of 1849.

The provision of the code I have quoted is as broad as language could make it, and was, I have no doubt, applicable to every action, whether for a wrong or on contract. It was even

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applicable to an action on a contract joint and not several, if there was any separate defense of which one of the defendants might avail himself, such as infancy, discharge in bankruptcy, &c. But as to any defense not separate, that is, for which a separate judgment could not have been rendered in favor of one defendant alone, the statute very properly excluded the testimony of a co-defendant, because as to such matter the witness would be interested and therefore his testimony could not be received. Upon a joint contract, therefore, where a defendant had no separate defense, and where a several judgment could not be rendered without violating the contract, a defendant, if called as a witness, could prove nothing that would not enure to his own benefit, as well as to the benefit of his co-defendant, and, as to such matter, he was therefore interested and of course incompetent. But it was decided by a majority of the supreme court in *The Mechanics' & Farmers' Bank v. Rider*, (5 How. Pr. R. 401,) that even in an action against two defendants on a contract joint and not several, each defendant might be a witness for the other to a matter in discharge of the entire contract. This decision was made in May, 1851, and led to amending the code in July, 1851, so that the provision in question should not be applicable to an action on a contract joint and not several, or in which a separate judgment could not be rendered. The 397th section as thus amended was as follows: "A party may be examined on behalf of his co-plaintiff or a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment shall be rendered." The word "shall" in the line last quoted was subsequently changed to "can," which certainly improves the reading of the sentence, without materially affecting its meaning.

Though this section is not expressed in very clear terms, it seems to me there can be no doubt as to its meaning. Of course it can be applicable only when defendants are sued jointly. There can be co-defendants in no other case; and it declares as

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to what matters a defendant, thus jointly sued with others, may be a witness for his co-defendant. It is as to a matter in which he is not jointly interested, and as to which a separate judgment may be rendered. He is a competent witness in all cases where sued jointly, but only as to certain matters. He may prove that his co-defendant was not present, or, if present, that he took no part in the assault and battery, or any other separate defence of his co-defendant. As to such a matter, surely, he, the witness, has no interest, and cannot, therefore, be jointly interested with his co-defendant; and as to such matter, a verdict or judgment which is separate and not joint can be rendered; and it is, therefore, within the latter clause of the amendment of 1851. It is very plain that the 397th section applies to every case of a joint and several contract, and to every tort, which is always joint and several, and extends even further, viz. to contracts joint and not several, where one of the defendants has a separate legal defense, as may sometimes happen. Such separate defense must of course be some matter in which the defendant testifying is not jointly interested, and as to which a separate judgment may be rendered, such as infancy, forgery of the signature of the co-defendant, &c. This section admits of no other construction than that I have given it, without utterly destroying its sense and rendering it of no effect whatever. To say that it applies only to an action in which a joint judgment cannot be rendered, would confine it to a case where there is only one defendant, for where there are two defendants there may be a joint judgment; and it cannot mean an action where there is but one defendant, for in such case there can be no co-defendant, and the section would be inapplicable.

This court has already put a construction on this section in deciding the case of *Munson v. Hegeman* above referred to, in which Judge Gardiner said in regard to section 397 in the code of 1849, "the language is broad enough to embrace every case where there are co-plaintiffs and co-defendants, and it seems to me, that the only restriction imposed by implication is the one

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substantially embraced in terms in this section, as amended in 1851, namely that such party shall not be examined as to any matter in which he is jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment cannot be rendered." I entirely concur in this opinion of the learned judge, that the law on this subject is not at all changed by the amendment of 1851, and that such amendment was made only for the purpose of expressing in terms what before existed by necessary implication; and this view is fully sustained by the history of the legislation on this subject; the fact being notorious, that the amendment of 1851 was adopted for the purpose of correcting what was deemed an erroneous construction put on the act, in the case of the *Mechanics' and Farmers' Bank v. Rider*, above cited. My reasons for deeming that construction erroneous are fully set out in the dissenting opinion in that case, and need not be here repeated.

In every action for assault and battery, and in all other cases of tort, a verdict and judgment may be rendered in favor of one and against another defendant; that is, in the language of the act, a verdict or judgment separate and not joint may be rendered. In such an action then, a party may be examined for his co-defendant, *as to any matter* as to which a separate and not joint verdict or judgment can be rendered, and *as to any matter* in which he is not jointly interested or liable with such co-defendant. In all actions a defendant is a competent witness for his co-defendant. His admissibility as a witness cannot be questioned, but he is restricted as to the subject matter of his examination. If any question be asked tending to establish a defense of which the co-defendant cannot separately avail himself, the plaintiff is at liberty to object and the court must exclude it. Where a witness is called to the stand, who is competent to be sworn and to testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally and exclude him. It will not be presumed that an improper question will be asked him. It is only by ob-

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jecting to improper questions when asked, that a party can exclude improper evidence. A party having a witness on the stand may be called upon by his adversary to state what he proposes to prove and in that case he must state it. But he need make no such statement unless called upon to do so. It is enough for him to proceed and put his questions to the witness, unless desired to state what he expects to prove.

There are many things which the witness excluded in this case might have proved, that would have constituted a separate defense for the other defendants, and as to which the witness had no interest. He might have proved the other defendants were not present or took no part in the rencontre, or that the plaintiff struck first and that they acted only in self-defense. Any of these matters would constitute an entire and perfect defense for the other defendants for whom he would have testified, and would have been entirely distinct and separate from the defense of the witness. The witness might still have been found guilty, and the other defendants, on his testimony, might be acquitted. So too the witness would have been competent to testify as to admissions of the plaintiff, or as to any personal defense arising out of subsequent transactions, such as accord and satisfaction, &c. if it had been put in issue by the pleadings. So far, at least, I had supposed the practice at the circuit to be now well settled, that a defendant might testify in behalf of his co-defendant. But the question has arisen and some doubt has been expressed, whether a defendant when called to testify for his co-defendant, can be examined to mitigate the amount of damages as against the defendants for whom he testifies. Upon the mere question of mitigation, where a cause of action is clearly made out against all the defendants, I do not see how one defendant can be a competent witness for his co-defendant, for that is a matter as to which he is jointly interested with his co-defendant, and it is therefore within the exception made by the statute. He is jointly interested, because the damages are not divisible. There can be but one verdict and for one amount against all those found guilty. In *Halsey et al. v. Woodruff*,

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(9 *Pick.* 555,) the jury, in an action of trespass, had, in their verdict, erroneously assessed damages against one defendant at \$2 and against the other at \$75, and the court gave judgment against them for the larger sum. This was clearly right. The damages not being divisible, each defendant was liable for all the damages sustained, without regard to different degrees or shades of guilt, and he would have been liable to the same extent if sued alone.

In trespass all are principals; and if, in such an action, against two persons, they be proved guilty, and the plaintiff show that he has sustained damage to \$500 by their wrongful act, it would not avail one of the defendants that his co-defendant should testify in his favor that he had but little to do in inflicting the injury. If proved, it would not warrant any reduction of the amount of damages. Being concerned in the act, no matter to how small an extent, each defendant would be liable for the whole injury done by his confederates. Such evidence ought not therefore to be received. If confined in its operation to but one defendant, it would be immaterial, because it could have no legal influence; and if it had any legitimate tendency to diminish the amount of damages, it would be a matter as to which the witness was jointly interested with the other defendant, and should therefore be excluded.

If however the case made out against the defendant who is called as a witness is a doubtful one, I see no objection to receiving his testimony to mitigate damages for his co-defendants, under proper instructions to the jury, to consider it if they acquit the witness, and to reject it if they find him guilty. As the court cannot anticipate in doubtful cases, or in cases where there is a conflict of testimony, whether the defendant offered as a witness will be acquitted or convicted, the course I have suggested in such case seems to be necessary for the protection of the rights of the other defendants.

It is said to be difficult for a jury to separate, in their minds, the evidence given by a defendant for his co-defendant from the other evidence, so that the witness shall not himself be benefited



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by his own testimony. This would be a proper consideration for the legislature, but not for this tribunal. It may be that in some cases a proper discrimination will not be made. The same difficulty exists where a maker and indorser are sued jointly on a promissory note, in which case precisely the same rule of evidence prevails. But the difficulty of discriminating and giving proper effect to the evidence is quite trifling, compared with the greater evil of depriving a defendant sued with others of the same privilege of calling witnesses enjoyed by the plaintiff.

It was perhaps sufficient for the purpose of deciding this case, to have discussed the question whether one defendant in an action for tort can in any case be a witness for his co-defendant; and it may have been unnecessary to inquire as to what particular matters he may be examined. But it seemed to me appropriate to the discussion and a legitimate argument in favor of the construction for which I contend, to show that it secures to a defendant sued with another all of the rights of which he had been unjustly deprived under the late practice. His cause may now be tried so as to give him the benefit of all or of nearly all the testimony he would have had if sued alone. A construction that secures such a practical result is in accordance with the well settled rule of law, which requires a remedial statute to be so construed if possible, as to effectuate the contemplated reform.

It is enough, however, that each defendant was a competent witness in this case for his co-defendant; and the court below having erred in deciding otherwise, the judgment should be reversed and a new trial ordered.

JOHNSON, J. Sec. 897 of the code of 1849, provided that "a party may be examined on behalf of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined." Although the permission to examine a co-plaintiff or co-defendant is given in general terms, so that standing alone, it would cover every case of co-plaintiffs or co-defendants, we held this generality restrained

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by the subsequent words, upon the general principle that a statute is not to be construed to authorize the doing of any thing which by the provisions of the same statute would be ineffectual for all purposes when done. In *Munson v. Hegeman*, (March, 1853,) we accordingly held that where the examination of a party by his co-plaintiff or co-defendant, could not be used in the suit at all, without operating on behalf of the party examined, he could not be examined. We further held, that the cases in which the testimony could not be used for the co-plaintiff or co-defendant, without operating in favor of the party examined, were those in which the party examined and his co-plaintiff or co-defendant were jointly interested or liable, and separate judgments could not be rendered. Applying these rules to the case then before us, we determined that one of the defendants could be examined by the other, and reversed the judgment below on the ground that the judge at the trial had refused to allow the defendant, who was offered to be examined on behalf of his co-defendant, to be sworn. That was an action against two for the unlawful conversion of two canal boats, it being alleged that one defendant sold them at auction, and the other bought them. The complaint charged that the defendants acted in concert together, with the purpose of appropriating the boats to their own use, or to the use of one of them, and that they had so converted them. Our decision, therefore, necessarily involved the proposition that defendants sued jointly for a wrongful conversion of personal property, did not, necessarily, come within the rule of exclusion before stated. That of defendants so sued it could properly be said, that they were not jointly interested or liable, and that a separate and not joint judgment could be rendered.

We are now prepared to examine the provision on this subject in the code of 1851, on which the determination of this case depends. Section 397 says, "A party may be examined on behalf of his co-plaintiff or a co-defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict

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or judgment shall be rendered." But the examination thus taken shall not be used in behalf of the party examined. The competency of a witness or the admissibility of testimony, must be decided when the question arises and as the case then stands. We cannot, therefore, construe the expression "verdict or judgment shall be rendered," as importing that the competency of the witness, or the admissibility of the testimony, is to be determined according to the verdict or judgment afterwards to be rendered. That makes nonsense of the provision. I think it should be construed "can be rendered," in accordance with the amendment of 1852. The defendants were sued jointly for an assault and battery. The court refused to allow either of them to be sworn and examined on behalf of the others, thus in effect determining that no supposable state of the case could render one examinable for the other or others. Now it is apparent that one defendant is not jointly interested with the others, because his interest is that the others should be found guilty; for thereby if he also is found guilty it may be that the judgment will be levied out of the property of the others in which case as there is no contribution between wrong-doers, he would in effect escape altogether; nor are they jointly liable, because although a recovery in form joint may be had against all who are convicted, and although the plaintiff has alleged a joint trespass, he may recover against any one or more, and the others be acquitted. The liability is, therefore, not necessarily a joint liability of all who are sued. A matter cannot be said to be one in which both are jointly interested or liable, unless from the nature of the case, the same event necessarily attends on the rights of both. If one may be acquitted and the other convicted, in respect to their original liability, I cannot see the jointness. This is obviously true in respect to persons charged as joint trespassers, and always was the law. That in such a case a separate and not joint verdict or judgment may be rendered, always was and still is the law; one may be acquitted and the other convicted, and if that does not constitute a capacity to have separate verdicts and judgments, I cannot conceive what would.

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It was argued that the statute should be read "as to which a separate verdict or judgment can be and a joint verdict or judgment cannot be rendered." If the statute were so worded I am ready to concede that the consequences drawn from that construction would follow. But the difficulty is that the statute is not so worded, and so to construe it gives no other force to the language than would have been conveyed if the words had stood, "as to which a joint verdict or judgment cannot be rendered." So read it would render the whole section nugatory, for in every action where there are more defendants than one there may be a joint judgment. It is proposed to borrow the exposition of this statute from the rules which governed the examination of co-parties in suits in equity, and to hold it to be substantially an adoption of those rules, with the addition of those few cases in which, by statute prior to the code, one party could be examined at law in behalf of or against a co-party. I do not think that the old rules upon this subject form any guide for the construction of the code. Almost every section of it is pregnant with an intention to alter the law, and nowhere is that intention more conspicuous than where it deals with the subject of the competency and examination of witnesses. There is now but one method of procedure, embracing all cases, both at law and in equity, and one set of provisions, which are to govern all cases. Wherever the lawmakers have recognized in distinctions previously existing, a foundation belonging to the nature of the subject, and not to the artificial system in which it was included, and have thought those distinctions proper to be still preserved, they have so provided. How far that course was proper to be pursued, was a matter as to which their determination was final as their power to act was plenary. If the language in which they have conveyed their will does not by its own force continue those rules, and preserve those distinctions, I am unwilling to strain its obvious import for the sake of conformity to them.

The judgment should be reversed and a new trial ordered, costs to abide the event.

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DENIO, J. In the code of procedure enacted in 1849, the provision enabling parties to call their associate plaintiffs and defendants, was in these words: "A party may be examined on behalf of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined." (*Laws* 1849, p. 692, § 397.) Before this cause was tried the provision had been amended, by inserting at the end of the first branch of the sentence, after the word "co-defendant," the following words: "*as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment shall be rendered.*" (*Laws* 1851, p. 908, § 397.) The law stood thus at the time of the trial. The section was again amended in 1852, by changing the word *shall* to *can*, but not altering the provision in any other respect. (*Laws* 1852, p. 662, § 397.) This last change was made after the trial of this cause; and, if it modifies in any degree the construction of the provision, it cannot affect the decision we are now to make. But I suppose the meaning was not changed by the substitution of *can* for *shall*. As the question respecting the competency of a witness is to be determined when he is offered, which, of course, is while the trial is in progress, and before any verdict or judgment is pronounced, it would be manifestly absurd to enact that its determination should depend upon the subsequent decision of the jury or the court, upon the alleged cause of action. It was intended in both cases to refer to the legal character of the action. If it was an action in which a separate and not a joint verdict or judgment must ultimately be rendered, a defendant could call his co-defendant; and in that case only. The last amendment was designed simply to render the provision more rational and perspicuous, and not to change its meaning.

The action in this case was for an alleged assault and battery. It was for a tort; and it belongs to the class of actions which are joint or several, at the election of the party injured. The plaintiff in this case elected to deal with it as a joint trespass, and he sued all the alleged wrong-doers. If he proved them all

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guilty, he was entitled to a joint verdict and judgment. Indeed, this is the only judgment he could have if he prevailed against all. If the jury should perversely give separate damages, it would be illegal, and the plaintiff would be entitled to judgment against all, for the largest amount of damages found against any one. (*Halsey v. Woodruff*, 9 Pick. 555.) The question here arose after the plaintiff had proved a *prima facie* case against all the defendants, and had rested. The defendants then offered to call each other, and the alleged error is that the court refused to allow them all to testify for the defense, in this action for a joint trespass. First, then, was each defendant when called, "jointly interested" with the other defendants who respectively called them, as to the alleged assault and battery? That the proposed witness was *interested*, is clear, if any person was. The defendants were alike interested, one precisely as much as another—the proposed witness equally with the defendant who called him. Each defendant was interested to defeat the action altogether; or, if this could not be done, to make the damages as light as possible. But was the witness *jointly* interested with the defendant who called him? As the case stood, he certainly was. It was an action for a joint wrong, which, if made out as alleged, must be followed by a joint judgment; for no other could possibly be given. Then take the next word in the statute, *liable*. Was it a matter in which he was *jointly liable* with the defendant who called him? If he was liable at all, he was jointly liable, for we have seen that if the action was sustained, there could be no several judgment against them. It would be preposterous to say that perhaps the defendant who called his co-defendant was not liable at all, that is, that he was not guilty. This, of course, could not be ascertained until the verdict was given, and the question was to be determined then, without the light which that verdict would afford. The legislature did not suppose that when a witness was called, the court would inquire, in order to determine upon his competency, how the issue ought ultimately to be decided. The expressions, *jointly interested* and *jointly liable*, refer to the nature of the

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action. If the action sets up a joint interest or a joint liability in the defendants, they cannot be witnesses for each other. If the demand or liability sued on is several as respects the several defendants, that is, if one is sued for one thing, and another for another thing, in the same action, as is often the case, each can call the others as a witness. But the remaining language of the statute is, if possible, still more conclusive. It must be a case, or matter, "as to which a separate *and not joint* verdict or judgment" can be rendered. In other words, it must be such a claim, demand, or cause of action, as that a separate judgment can be rendered against the party calling the witness, and it must, moreover, be such a one that a joint judgment, against such party and the proposed witness, *cannot* be rendered. Here again the statute looks at the theory of the action, or matter in controversy. It assumes that the plaintiff may prevail, and not that he will be certainly defeated. It must be a case which if sustained, as alleged, will produce separate judgments, and in which a joint judgment cannot be given. This is the direct opposite of this case. Here, if the plaintiff recovers according to the complaint he must have a joint judgment, and cannot by any possibility have separate ones. It is manifestly, therefore, a case in which the defendants cannot, under this statute, give testimony for each other. If the defendants were competent witnesses for each other, in this action, co-defendants can be examined for their associates, in every possible case. It has been argued that the restriction in the amendment of 1851, is limited to actions upon joint contracts. Formerly, it is true, a plaintiff suing on an alleged joint contract must recover against all the defendants, or fail altogether in the action. But this is otherwise by the code. If in such an action it appear that one or more of the defendants are not joint contractors, as in the case of too many sued as partners, judgment passes against those who are really parties to the contract, and the others are entitled to judgment in their favor. (*Code*, § 274.) In such an action separate judgments may be given, if the proof inculcates one and acquits the other, precisely as in an action for a tort. The

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action is upon a joint liability in both cases, and in both cases a joint judgment *may* be given; and such a judgment must be given, if the plaintiff proves his case. If it be allowable to strike out of the statute the words, "and not joint verdict or judgment can be rendered," which is indispensable to enable co-defendants in actions of tort to swear for each other, I see no difficulty in holding that co-defendants, in actions *ex contractu*, are competent witnesses for their associates; and thus, the restriction carefully incorporated into the section in question, by the amendment of 1851, becomes entirely nugatory. These are some of the difficulties which the defendants have to encounter in construing the statute so as to meet their views. I may as well state here that when the words of the statute are plain and explicit, there is no room for the business of construction. The duty of the court is simply one of obedience. We read in the provision, that where the matter in litigation is one in which a joint verdict or judgment cannot be rendered against the defendants, they may call each other as witnesses; and it is not pretended that there is any other provision allowing them to testify for each other. How then can it be said that in an action against several for a joint trespass, where a joint verdict and judgment is a matter of course if the action is sustained, that each defendant can be sworn for the others? To me it seems inconsistent with any fair pretense of loyalty to the statute.

There is a numerous class of cases where the several defendants have no joint interest or liability, and where several judgments must be, and joint judgments cannot be rendered. Actions against the several parties to bills of exchange and promissory notes, is one instance. The holder may sue the maker and indorsers of a note, or the acceptor, drawer and indorser of a bill in one action. But their liabilities are several, and no joint judgment can be rendered. The statute applies to this case. Again, in a great many cases formerly cognizable in courts of equity, but which are now dealt with under the provisions of the code, the defendants' interests are several. In suits by a judgment



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creditor, for instance, all the parties who have his property in their hands are made defendants, though there is no sort of privity among them, and the decree will be several against each according to his individual liability. So in bills to enforce a trust, all the parties who have interfered with the trust estate are made parties; and so also in suits to foreclose, or redeem mortgaged premises, separate and independent incumbrancers are proceeded against in the same suit. Then again there may be several plaintiffs whose interests are separate and distinct, as in the case of separate and independent creditors, legatees, next of kin and *cestuis que trust*, suing a trustee or personal representative of a deceased person. These persons may, and when not inconveniently numerous, must join as plaintiffs. It is to this class of cases, in my opinion, that the section under consideration refers, as it is to such cases, only, that the language applies. The section, it will be observed, allows co-plaintiffs, as well as co-defendants, to be witnesses for each other, subject to the same restrictions; but it will be impossible, I think, to imagine a case where it would not be preposterous for one plaintiff to be a witness for his associate plaintiff, unless it be one of the class last referred to. In all actions of strictly legal cognizance, the plaintiffs where there are several must have a joint interest, and there can be no recovery unless all are found entitled to judgment. Suppose a case, therefore, where several joint owners of real or personal property have occasion to prosecute several persons for an injury to such property, upon the rule contended for by the defendants in this case, all the defendants could swear for each other, while none of the plaintiffs could be heard to say a word in their own behalf.

It is supposed by the defendants' counsel that the word *matter* in the section in question, is used in the sense of *topic, feature, or circumstance*. Thus, when the defendant J. McKinnon called the defendant A. McKinnon, it is argued that it was to give evidence as to the individual complicity of the former in the assault; and the inquiry is said to be whether the restrictive words in the statute can be predicated of that matter. If this were a

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just criticism it would not aid the defendants, for assuredly a joint verdict and judgment could and must be rendered upon that particular subject, if found in favor of the plaintiff. But this is not a correct exposition of the statute. The language of the restrictive sentence is evidently taken in part from the 73d rule of the late court of chancery, which allowed the examination of a co-defendant against the complainant "as to any matter in which he was not interested." The statute in question superadds the other words, to make it still more clear, that the right to examine was confined to the case where one of the defendants was charged with a distinct and separate liability, with which the witness had no connection, and to limit the testimony to facts relating to that separate liability. Under the rule prevailing in chancery, a defendant could never be heard as a witness where he and the defendant who called him were jointly charged with the same matter, though the case were such that one might be acquitted by the proof, and the other found responsible. (*Whipple v. Lansing*, 3 *John. Ch. R.* 612.)

Again it is argued that the provision which has been allowed to remain in the section, declaring that the testimony of a party shall not be used in his own behalf, has an important bearing upon the case. I think it has none at all. When parties are sued upon several liabilities, there are generally some grounds of defense common to them all. Take the case of separate indorsers upon a promissory note. Usury, or payment by the maker, would discharge all the parties. So persons prosecuted in one suit as separate and independent trustees of a judgment debtor, could defend themselves by proof showing the judgment paid, or otherwise discharged. These defenses might be proved by one of the defendants, for the benefit of the others, and the facts would be equally pertinent for the defense of the witness; but the provision referred to would prevent him from availing himself of it. In fact the clause is just as necessary in the way I read the statute, as upon the construction for which the defendants contend. It has no tendency to show that

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a defendant can be a witness in respect to a matter wherein he is jointly charged with the party calling him.

It is no necessary part of the duty of a judge to vindicate the policy of the law. Were it otherwise, it would be easy to show that the maxim which forbids a party to be heard as a witness in his own case, is founded in wisdom, and ought not to be changed to suit any speculative theories of the nature of evidence. Men of ingenious minds have fancied that the truth, which is the object of all contrivances for the investigation of facts, would be more likely to be attained, if the parties were allowed to give their own account of the disputed transaction as witnesses upon their oaths. No doubt this would sometimes be the case, though my own experience, in some instances where this has been done by consent, would be any thing but favorable to the practice as a means of settling contested matters of fact. But a judicious lawmaker will not limit himself to a single aspect of the question where a long established rule is sought to be changed. In a large class of litigated cases, especially in actions like the one under review, the parties come to the trial with minds excited by interest, prejudice and passion. A system, which shall invite them to take the stand as witnesses against each other, will offer a premium to the practice of dissimulation, craftiness and perjury; and will in my judgment inflict an injury to public morals, which no fancied advantage can in any degree atone for. The notion of limiting the application of the testimony to the case of the other parties jointly charged with the witness, would be found in most cases entirely illusory. The present action furnishes as good an illustration of that point as any other. Here were five defendants charged with a joint assault and battery upon an individual. Testimony from indifferent witnesses had made out a *prima facie* case. It is therefore probable that a personal conflict of some character had taken place, and that the question was as to which party was the aggressor, the plaintiff or the defendants. Then it is proposed that each defendant shall give his account of the matter on oath, not professedly as evidence on his own behalf, but as a witness for the others, and the jury,

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*Roosevelt against Brown.*

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sitting without the conveniences for taking minutes, and not possessing habits to qualify them for making a discriminating analysis of the evidence, are expected to give a verdict upon the case of each defendant, not upon the general merits of the conflict, according to all the testimony, but by applying to each defendant, a history of the occurrence, of a different character, it may be, from that which is to be applied to each of the others. This would be sufficiently intolerable if the plaintiff's account was also to be heard: but he, unfortunately having no associate on the record, must submit to be silent and have the case determined upon the oaths of the very individuals whom he has prosecuted for an outrage upon his person.

I am in favor of affirming the judgment of the supreme court.

ALLEN, J. also delivered an opinion in favor of affirmance.

Judgment reversed.

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*ROOSEVELT against BROWN.*

The owners of stock are "the persons composing the company," within the seventh section of the act of 1811, relative to incorporations for manufacturing purposes.

A person to whom stock is transferred on the books of the company and who upon such books appears to be the legal owner, is liable to creditors under the seventh section of the act, though it was transferred to and held by him as collateral security for a debt.

Accordingly, where D., the owner of stock in a company incorporated under the act of 1811, agreed with a firm to transfer it to B., one of its members, as collateral security for his indebtedness to the firm, and that the latter might sell sufficient of the stock to pay such indebtedness on a specified contingency; and D. in performance of the agreement transferred the stock to B. on the books of the company absolutely, and it was so held by him when the company was dissolved; *Held*, that B. was individually responsible to a creditor of the company to the amount of the stock.

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*Rosevelt against Brown.*

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**ACTION** to recover of the defendant the amount of a debt due from the Moravia Cotton Mill, a manufacturing corporation, on the ground that he was one of its stockholders at the time of its dissolution.

The suit was brought in the superior court of the city of New-York, and tried before Justice Bosworth and a jury.

The plaintiff proved that the company was incorporated on the 15th of May, 1831, under and pursuant to the act relative to incorporations for manufacturing purposes, passed March 22, 1811; that it carried on business at Moravia, Cayuga county, till November, 1850; that proceedings were taken for its dissolution in January, 1851, and it was dissolved by the judgment of the supreme court in May of that year. He also proved and read in evidence a note made by the company, dated Oct. 4, 1850, payable to the plaintiff, or order for \$108.83. Artemas Cady, a witness sworn on behalf of plaintiff, testified that he was the agent of the company to July, 1850; that the book produced by him was the book of the company on which its stock was transferred, and that he saw Orsamus Dibble execute the transfer of stock to the defendant in said book contained, and witnessed its execution. The said transfer was then read in evidence from said transfer book, as follows: "20 shares. For value received I hereby transfer and assign to Silas Brown twenty shares of the capital stock of the Moravia Cotton Mill of Moravia. As witness my hand and seal, this 19th of June, 1843.

In presence of A. Cady.                      ORSAMUS DIBBLE. [L. s.]"

The witness further testified that he once and in or about the year 1847, called on the defendant for a proxy to Dibble to vote on this stock, and that the defendant gave him such proxy; that Dibble resided and did business as a merchant at Moravia. The defendant in his defense offered to prove and read in evidence a contract of which the following is a copy, viz:

"This agreement between Silas Brown & Co. and Orsamus Dibble witnesseth—That the said Brown & Co. agree to sell the said Dibble, from time to time as he may require, a further supply of goods, so that his indebtedness to them may amount to

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*Rosevelt against Brown.*

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a sum not exceeding \$1000; and the said Dibble agrees to transfer to Silas Brown for the benefit of said Brown & Co. as collateral security for his indebtedness to them, the stock which he now owns in the Moravia cotton factory amounting to about the sum of \$2000. And it is understood between the parties, that the said Dibble shall from time to time make such payments on account to the said Brown & Co. as he may be able, and the said Brown & Co. agree to sell to the said Dibble, from time to time, an amount of goods equal to the payments he may make, so that his indebtedness may at any time remain at a sum not exceeding \$1000; and it is further understood and agreed, that in case the indebtedness, or any portion of it to the said Brown & Co. shall remain unpaid at the end of two years from the date of purchase, that they shall in that case have the right to sell or dispose of the said factory stock to an amount sufficient to pay any portion of their claim which may remain unpaid at the end of two years from the date of purchase.

New-York, June 3, 1843.

SILAS BROWN & Co.

ORSAMUS DIBBLE;

and to prove, in connection with said contract by said witness, A. Cady, that the firm of Silas Brown & Co. were merchants, doing business in New-York, composed of the defendant, Andrew A. Brown, George L. Brown and Giles S. Ely; that the said transfer of stock to the defendant was made in pursuance of said contract, and that the witness so knew at the time of the execution of the transfer by Dibble, which was drawn by the witness; that such transfer was made at Moravia, in the absence of the defendant, and of all the members of the firm of Silas Brown & Co., and that its form was unknown to them; that the debt secured by the transfer of stock had been liquidated by Dibble's note, which Brown & Co. held, and on which a large balance remained unpaid; that Dibble had from time to time received the dividends on said stock and applied the same in payment of the interest on the note held by Brown & Co.; that they had never made sale of the stock pursuant to the contract; and that on the 27th of April, 1848, Dibble assigned to the firm

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of A. G. & H. Brown, as security for an indebtedness to them, any balance he might be entitled to on the sale of the stock, after paying the amount due defendant or the firm of Brown & Co. The counsel for the plaintiff objected to the proof so offered and the same was excluded, and the counsel for the defendant excepted.

The jury thereupon under the direction of the said justice, rendered a verdict in favor of the plaintiff for the amount of said note. The justice ordered the exceptions taken on the trial to be heard at general term before judgment on the verdict. The cause was heard at a general term of the superior court on a bill of exceptions, and a new trial denied, and judgment ordered against the defendant; he appealed to this court.

*D. Lord, Jr.* for the appellant.

*S. P. Nash,* for the respondent.

EDWARDS, J. The "Moravia Cotton Mill" was organized as a corporation on the 15th of May, 1831, under and in pursuance of the "act relative to incorporations for manufacturing purposes," (1 R. L. 1813, p. 247; 3 R. S. 220.) On the 4th day of October, 1850, it gave the note upon which this action was brought, and on the 6th day of May, 1851, it was dissolved by a judgment and decree of the supreme court. The seventh section of the act under which the corporation was created, provides, that "for all debts which shall be owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in said company." (1 R. L. 1813, p. 247, § 7; 3 R. S. 222, § 7.) This action is brought against the defendant as one of the persons composing the company known as the "Moravia Cotton Mill."

It was proved upon the trial that on the 19th of June, 1848, Orsamus Dibble transferred upon the books of the company,

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Roosevelt *against* Brown.

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twenty shares of the capital stock to the defendant, and it is not pretended that any subsequent entry was made in the transfer books, in reference to those shares. The defendant offered to prove an agreement between Dibble and the firm of Silas Brown & Co., bearing date on the third day of June, 1843, for the purpose of showing that the transfer of the stock to the defendant was merely by way of pledge. This evidence was rejected by the judge before whom the action was tried, upon the ground, as I suppose, that the absolute transfer upon the books of the company could not be explained or controlled by any separate and distinct agreement entered into between the parties to such transfer.

A corporation, although it is an artificial existence, must be composed of natural persons who manage and administer its affairs and receive its benefits. These persons are not generally named in the charter of incorporation, and there must be some way of ascertaining who they are. In a joint stock company they are, and they necessarily must be, those who *hold* the evidence that they are the owners of the stock; they are called the stockholders, and not the stock owners, and they are generally those who appear upon the transfer books of the company to be stockholders. This must be so in the case of corporations which are subject to the provisions of the revised statutes. (1 R. S. 604, § 8.) As between himself and third parties, the person who appears upon the transfer books to be a stockholder, may have parted with all his interest in the stock, but as between himself and the corporation, such person, and he only, is treated as a stockholder. This is his relation as regards the management of the company, and the benefits to be derived from it; and the question is presented here, whether he is so as regards the liabilities of the company. In the case of *Adderly v. Storm*, (6 *Hill*, 624,) stock had been transferred to the defendants as security for a debt, with the right to sell at any time, although they were restricted to a particular price, in case that they sold before their debt became due. The debt was duly paid, and they gave a power of attorney authorizing a transfer of the stock



to the person from whom they had received it. After this had been done, and before any transfer had been made on the books of the company, the debt for which the company was sued, had been contracted. The court held, that although the defendants had but the mere formal title to the stock, yet that they were liable as stockholders, and the court say, that "they might receive dividends, vote at elections, and enjoy all the other rights appertaining to the ownership of the property, and with the privileges they must take the burthen of the stockholders." The court further say that "after the defendants had once become the legal owners, they could only throw off the liabilities incident to that relation by transferring the stock. Until this was done they continued to be stockholders within the meaning of the statute. If we depart from the terms of the law, and inquire into the equities which may exist between the stockholders and some third person, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may be done by the corporation. If creditors must look beyond the legal title, they never can know against whom to proceed." It seems to me that this reasoning is sound, and that according to every principle of justice they should be liable as stockholders for the debts of the company who are entitled to manage its affairs. In the case of *Worrall v. Judson*, (5 Barb. 210,) the defendant had sold his stock, and transferred to the vendee his certificate of stock, with his name indorsed thereon, but the stock continued to stand upon the books of the company in the name of the defendant, and it was held that he was liable as a stockholder for a debt contracted by the company. These decisions were made in the supreme court, and are not binding as authority upon this court; but they have hitherto been acquiesced in, at least they have not been reversed, and, in my judgment, they are based upon sound principles.

It is said, however, that there is a distinction between these cases, and the one before the court. The statute applicable to the cases cited provides, that the *stockholders of the corporation*

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Rosevelt *against* Brown.

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shall be personally liable, and the statute under which this action is brought provides, that the *persons composing the company at the time of its dissolution* shall be liable. There is undoubtedly a difference in the language of the two statutes. But I think that the distinction is not favorable to the defendant. The persons who are liable in the latter case, are those who composed the company at the time of its dissolution. But who are the persons who can properly be said to compose the company at the time of its dissolution? It seems to me that there is but one answer to be given to this question, and that is, that they are those who are entitled to the management of its affairs. Other persons may have an interest in the property of the corporation, but they do not compose the company. But it is said that the agreement which was offered in evidence shows that the stock was pledged, and not sold to the defendant, and that as the pledgee is not the owner of the thing pledged, the pledger never ceased to be the owner of the stock. That may be so, but he has ceased to hold the evidence that he is the owner of it. He has transferred that to another, and this made him the stockholder. The usual, though not the universal way in which stock is pledged, is by delivery of the certificate of the company by the pledger, with a power of attorney to the pledgee to make a transfer upon the books of the company. If the defendant had pursued this course, he would have had no difficulty. But he chose to pursue a different course, and although he may have become but a pledgee, still, he became the pledgee of a thing which gave the person who held it, in the manner in which he did, certain rights and privileges, and at the same time rendered him subject to certain liabilities. It is said by the defendant's counsel that in the present case the defendant had only a lien upon the stock; but, in the cases above cited, he had not even that. He had but a mere formal title, that is, his name was on the transfer books of the company as a stockholder; the ownership was in another person. I think that the agreement which was offered in evidence was properly excluded, and that the judgment should be affirmed.

JOHNSON, J. The 7th section of the act relative to incorporations for manufacturing purposes, passed March 22, 1811, (3 R. S. 2d ed. 222,) provides "that for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further." Upon the evidence admitted at the trial, the defendant appears to have been within the description of the persons responsible for debts of the company owing at the time of its dissolution. The question before us, therefore, is, whether the evidence excluded at the trial, taken in connection with the other facts in the case, would have shown, or tended to show, that the defendant was not within the meaning of the above section, one of the persons composing the company. On looking at the different sections of the act, the persons composing the company appear to be the stockholders therein; and this too is the obvious construction of the terms employed. The act furnishes no other test for determining who the persons composing the company are. I am entirely satisfied with the determination in *Adderly v. Storm*, (6 Hill, 624,) and with the reasons assigned for that judgment. In that case the beneficial interest of the defendants in the stock had ceased by the payment of the debt as security for which they held it, and yet, although they had given a power of attorney to re-transfer the stock, as it had not been actually re-transferred when the debt was contracted by the company for which they were sought to be charged, they were held responsible. It is true that in that case, the stockholders at the time when the debt was contracted, were held to be those upon whom under the statute personal liability for the debts of the corporation attached, while under the act now in question, stockholders at the time of the dissolution of the company alone are personally responsible. Upon this difference in the two statutes it was argued, that the decision in *Adderly v. Storm* might be sustained, upon the ground that credit would be deemed to have been given to the company, on the faith of the responsibility of the persons appearing to be

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Roosevelt against Brown.

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stockholders, and that they therefore might be held responsible on the same principle upon which ostensible partners, who are not actually partners, are charged with the debts of the partnership in which they allow themselves to appear to be partners. The court however refused to put *Adderly v. Storm* upon that ground. (See p. 629.) After stating the argument upon that view of the case they say, as the defendants were in fact stockholders they must answer to the plaintiff, although he may not have known at the time he trusted the company that the defendants could be reached.

But if *Adderly v. Storm* had been put upon that ground, it would not, I think, have aided the defendant in this case. For although it would not necessarily follow, that those who were shareholders at the time of the making of the contract, would continue to be so until the dissolution of the company, if that event should happen, yet the character and responsibility of those who were members of the company and the probability of their continuing members, might fairly and would naturally influence the credit of the company, in the estimation of one about to deal with it. Such a person might well say, these are the persons who would be personally responsible if the company should now be dissolved, and I will trust the company upon my estimate of the probability of their continuing to be stockholders. So thought the supreme court of Maine, in *Stanley v. Stanley*, (18 *Shep.* 191,) where they say "it is important that any one giving credit to a corporation should at the time be able to ascertain who the individuals are, who may become ultimately responsible to him;" and they therefore held that so far as creditors were concerned, a person appearing to be a stockholder on the transfer books, was liable as such.

In the case now before us, by the agreement between Silas Brown & Co. and Dibble, the stock was to be transferred to Brown individually, as collateral security for Dibble's debt to S. Brown & Co., and they in the case provided for in the contract were to have the right to sell. This agreement was performed on Dibble's part, by the absolute transfer of the title to

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*Waterman against Whitney.*

the stock to Brown. He thereupon became a shareholder in the company, and as such is liable in this suit. Any other rule would in my opinion conflict with the policy of the law, for under no other rule could a dealer with the company ascertain with certainty, the individuals to whom in the event of the dissolution of the corporation he may have recourse. The judgment should be affirmed.

RUGGLES, DENIO, ALLEN and PARKER, Js. concurred.

SELDEN, J. dissented.

Judgment affirmed.

P. 165

WATERMAN and others *against* WHITNEY and others.

Upon a question of revocation of a will, no declarations of the testator are competent evidence except those which accompany the alleged act of revocation.

*Per* SELDEN, J.

- They are received as a part of the *res gestæ* and to show the intent with which the act was done. *Per* SELDEN, J.
- Where a will is disputed on the ground of fraud, duress, imposition or other like cause not drawing in question the testator's mental capacity at the time of its execution, neither his prior or subsequent declarations are evidence. *Per* SELDEN, J.
- But where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence which involves his mental condition at the time it was executed, his subsequent statements touching the disposition of his property and inconsistent with the will, in connection with other evidence tending to prove a want of mental capacity, are competent.
- Smble, that on these issues his declarations, made before the will was executed, are evidence under the same restrictions and for the same purpose.
- Such prior or subsequent declarations are competent evidence on these questions, only as tending to prove the testator's mental condition when the will was executed.
- When from the remote period at which the declarations were made, or other cause, they do not legitimately bear upon the state of the testator's mind when the will was made, they should be excluded. *Per* SELDEN, J.

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*Waterman against Whitney.*

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IN July, 1846, the surrogate of Broome county made an order refusing to admit to probate, the will of Joshua Whitney, late of Binghamton, in said county, who died in April, 1845. The respondents, Waterman and others, appealed from the order of the surrogate to the circuit judge of the sixth circuit ; who in 1847 reversed the order, and directed feigned issues to be made and tried at the next circuit court, to be held in the county of Broome.

Issues were afterwards settled as follows : 1. Was the instrument propounded by Thomas G. Waterman and others, before J. R. Dickinson, Esq. late surrogate of the county of Broome, bearing date on the 26th day of February, 1844, and purporting to be the last will and testament of Joshua Whitney, deceased, late of the town of Chenango, county of Broome, duly made and executed by the said Joshua Whitney as his last will and testament? 2. Was the said Joshua Whitney, deceased, at the time of making and executing the said paper writing bearing date the 26th day of February, 1844, purporting to be his last will and testament, of sound mind, and capable of making a valid disposition of his property, real and personal, by last will and testament?

3. Was there, on the day of executing the said paper writing, purporting to be the last will and testament of the said Joshua Whitney, deceased, or at any time previous, any undue influence, fraud or deception used or practiced, by any person or persons whatever, to cause or induce the said Joshua, deceased, to make or execute the said instrument, propounded by the said Thomas G. Waterman and others for proof, as the last will and testament of the said Joshua Whitney, deceased?

Upon the trial of these issues, at the circuit, before Justice Mason, after several witnesses had been called and examined on the part of the defendants, to prove the mental incapacity of the testator, all of whom had testified to facts tending to show that the mind and memory of the testator, who had been a man of vigorous intellect, were impaired at and previous to the time of the execution of the will, and that he had not mental capacity

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Waterman against Whitney.

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to make a will, the defendants called one Emory as a witness, by whom they offered to prove that the testator *after* the execution of the will, had stated to the witness how he had disposed of his property in his will, which was in a manner entirely different from the actual disposition of it by the will in question. This evidence was objected to; the court sustained the objection, and the defendants' counsel excepted. The defendants further offered to prove that deceased "made similar declarations to others *from the time of the execution of the will*, up to the time of his death." This was also objected to and excluded, and the defendants' counsel excepted.

The will contained among others the following clause, viz: "I give and bequeath to the heirs of William Whitney, deceased, all advances made him in his lifetime, and also two thousand acres of land on St. John's river, Florida, *formerly owned by said William.*"

Upon the trial, the defendants offered in evidence an exemplified copy of a deed, from the United States marshal of the district of Florida, dated February 19th, 1832, conveying the two thousand acres of land to William Whitney. This evidence was objected to by the plaintiffs' counsel, on the ground "that the defendants must first show from the statute of the state of Florida, that the deed is executed and acknowledged according to the laws of that state." The evidence was excluded, and the defendants' counsel excepted. The defendants also offered to prove, that the testator always spoke of the Florida lands as William's. This was objected to and excluded, and the defendants' counsel excepted. The jury found for the plaintiffs upon all the issues, the effect of which was to establish the will. Upon application to the supreme court for a new trial, upon a bill of exceptions, the motion was denied; and from this decision the defendants appealed to this court.

*D. S. Dickinson*, for the appellants.

*B. D. Naxon*, for the respondents.

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*Waterman against Whitney.*

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SELDEN, J. The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator made *after* the execution of the will. →

The subject to which this question belongs is of very considerable interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the omission to distinguish with sufficient clearness, between the different objects for which the declarations of testators may be offered in evidence, in cases involving the validity of their wills. It will tend to elucidate the subject to consider it, under the following classification of the purposes for which the evidence may be offered, viz: 1. To show a revocation of a will admitted to have been once valid. 2. To impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or for some other cause not involving his mental condition. 3. To show the mental incapacity of the testator, or that the will was procured by undue influence. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. They have, however, been considered in most of the cases without regard to it; and hence much of the apparent conflict among them will disappear, when the proper distinctions are taken.

To show the state of the authorities, therefore, and what the differences really are between them, it is necessary to arrange the cases according to this arrangement of the objects for which the evidence is given. In referring, however, to those belonging to the first of these divisions, it is proper to premise, that the revocation of a valid will, is a matter which not only in England, but in this state, and in most if not all the other states, is regulated by statute: and these statutes are substantially the same; those in this country being for the most part taken from the English statute of frauds. Most if not all these statutes require either a written revocation executed with the same formalities as the will itself, or some act



amounting to a virtual destruction of the will, such as burning, tearing, obliterating, &c. accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.

Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the *animo revocandi*, in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other, and in general entirely accord with the view here presented. I will refer to a few of the most prominent. *Bibb v. Thomas*, (2 W. Black. 1044,) was a case of revocation by throwing the will on the fire. The will was not consumed, but fell off the fire, and was taken up and saved by a bystander without the knowledge of the testator. The court held the revocation complete. The case was held to depend upon the intent with which the will was thrown upon the fire; and to establish this intent, the declarations of the testator, both at the time of the transaction and afterwards were received. So far as regards the declarations which accompanied the act, this was in accordance with general principles, and with all the other cases: but I apprehend that the declarations of the testator made after the transaction was over, could not in such a case be properly received. This distinction however was not taken, and the question did not arise. *Doe v. Perkes and others*, (3 Barn. & Ald. 489,) was a similar case, in which the declarations of the testator showed that he had abandoned the intention to destroy the will, before the work of destruction was complete. No declarations were proved in this case except those which were clearly a part of the *res gestæ*. In the case of *Dan v. Brown*, (4 Cowen, 483,) it was insisted by the counsel that upon a question of revocation the declarations of the testator made either before or after the act relied upon, were admissible, as well as those which accompanied the act itself: but the court held, that decla-

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Waterman against Whitney.

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rations accompanying the act, such as were a part of the *res gestæ*, were admissible for the purpose of showing the *quo animo*; but that no others could be received. In *Jackson v. Betts*, (6 Cowen, 377,) the main question was, whether a will proved to have been once properly executed, but which could not be found after the death of the testator, had been canceled or destroyed and thus revoked, or whether it continued in force: and evidence was offered of the declarations of the testator, during his last sickness, as to the existence of his will, and the place where it would be found. The supreme court held the evidence not admissible. The case ultimately went to the court of errors, and the chancellor there expressed doubts as to the correctness of the decision of the supreme court upon the point, but did not overrule it. (See 6 Wend. 173.)

I consider these cases as establishing the doctrine that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gestæ*, and for the purpose of showing the intent of the act.

The only direct decision to the contrary which has fallen under my observation is the case of *Durant v. Ashmon*, (2 Rich. S. Car. R. 184.) This case however is in conflict with authority as well as with principle. The fact to be proved in such cases is, the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompany the act, are to be regarded as mere hearsay, and should be treated as such.

In regard to the second class of cases, viz. where the validity of a will is disputed on the ground of fraud, duress, mistake or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and are strictly a part of the *res gestæ*. *Jackson v. Kniffen*, (2 John. 31,) is a leading case on this subject. In that case the plaintiff claimed

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Waterman *against* Whitney.

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as heir at law; the defendant under the will of David Kniffen. The plaintiff gave evidence tending strongly to show, that the will was obtained by duress, and offered to follow this up by proof of the testator's declarations, some of them made *in extremis*, that the will had been extorted from him by threats and duress. The court held the evidence inadmissible. Thompson, J. says: "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached, by the parol declarations of the testator himself, would in my judgment be eluding the statute, and an infringement upon well settled and established principles of law." In *Smith v. Fenner*, (1 *Gallison*, 170,) one of the questions was, whether the will of Arthur Fenner had been obtained by fraud and imposition, and the plaintiffs offered to prove declarations of the testator to that effect, made before and at the time of making the will and *immediately* afterwards. He also offered to prove similar declarations made afterwards at different times during the last years of his life. The court held that the declarations made *before*, as well as at or so near the time as to be a part of the *res gestæ* were admissible, but not those made afterwards. So far as this case seems to justify the reception of declarations made *before* the execution of the will to prove fraud or duress, I think it inconsistent with principle, as well as opposed to the best considered of the modern cases. In other respects it is in accordance with both. In the case of *Stevens v. Vancleve*, (4 *Wash. C. C. R.* 262,) it was made a question, whether a will had been duly executed: and as bearing upon that question, the defendants' counsel offered to prove that the uniform declarations of the testator in favor of the defendant who was the devisee, had been consistent with the disposition made by the will, from the year 1820 to the execution of the will in 1817. The evidence was rejected. Washington, J. said, "The declarations of a party to a deed or will, whether *prior* or *subsequent* to its execution, are nothing more than hearsay evidence, and nothing could be more danger-

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ous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. In *Moritz v. Brough*, (16 *Serg. & Rawle*, 403,) the supreme court of Pennsylvania held the declarations of the testator, whether made before or after the execution of the will, inadmissible for the purpose of proving fraud or coercion, although it is there conceded that for the purpose of showing the mental imbecility of the testator such evidence might be received. It was also unanimously decided by the court of errors of Connecticut, in the case of *Comstock v. Hadlyme*, (8 *Conn.* 254,) that the declarations of the testator, unless a part of the *res gestæ*, were not admissible for any purpose except to prove his *mental condition* at the time of executing the will. The same doctrine is held by the English courts. In *Provis v. Reed*, (5 *Bing.* 485,) it was sought to impeach the validity of the will by proving the declarations of the testator made after its execution. The evidence was rejected. Best, Ch. J. said, "It has been insisted that declarations of the testator were admissible in evidence, to show that the will he had executed was not valid: but no case has been cited in support of such a position, and we shall not for the first time establish a doctrine, which would render useless the precaution of making a will."

These cases must, I think, be sufficient to establish the position, that declarations of a testator, made either *before or after* the execution of the will, are not competent evidence to impeach its validity, on the ground of fraud, duress, imposition or other like cause. In one of *Coven & Hill's Notes to Philipps on Evidence*, (see note 481, p. 257,) it seems to be insisted that the declarations of a deviser are admissible against the devisee, upon the same principle with those of an ancestor against the heir, or of a grantor against his grantee. Perhaps they may be, where the declaration is in regard to the estate: but where it has reference to the validity of the will, the case is entirely different. Declarations of an ancestor grantor, &c. are admitted, because they are against the interest of the party making them, and might when made have been used

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against him. But these reasons do not apply at all to the declarations of a testator in regard to his will. He has no *interest* in the matter, and the declaration could never under any circumstances be used against him personally. The distinction is obvious and material. There are one or two cases in the reports of the state of North Carolina, which might seem to hold a contrary doctrine to that here advanced, viz: *Reel v. Reel*, (1 *Hawks*, 248,) and *Howell v. Barden*, (3 *Dev.* 462.) But the *decision* in the first of these cases is entirely reconcilable with the view here taken, although *all* that is said by the court may not be.

I have referred thus particularly to these numerous cases, in which the declarations of testators have been held *inadmissible* upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases on the subject. None of them have any application to cases in which the will is assailed on account of the insanity, or mental incapacity of the testator at the time the will was executed, or on the ground that the will was obtained by undue influence.

The difference is certainly very obvious between receiving the declarations of a testator, to prove a distinct external fact, such as duress or fraud for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter it is the most direct and appropriate species of evidence. Questions of mental competency and of undue influence belong in this respect to the same class: because as is said by Jarman, in his work on wills, "The amount of undue influence which will be sufficient to invalidate a will, must of course vary with the strength or weakness of the mind of the testator." (1 *Jarman on Wills*, 86.) So the mental strength and condition of the testator is directly in issue in every case of alleged undue influence;

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and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. It is abundantly settled that upon either of these questions, the declarations of the testator, made *at or before* the time of the execution of the will, are competent evidence. The only doubt which exists on the subject is, whether declarations made *subsequent* thereto may also be received.

Clear and accurate writers have been led into confusion on this subject, by not attending to the distinctions growing out of the different purposes for which the evidence may be offered. Mr. Greenleaf, in his work on evidence, in treating of the invalidity of wills, in consequence of the insanity, or mental imbecility of the testator, says: "In the proof of insanity, though the evidence must *relate to* the time of the act in question, yet evidence of insanity immediately before or *after* the time is admissible. Suicide committed by the testator soon after making his will is admissible as evidence of insanity, but it is not conclusive." And in the same section he adds: "*The declarations of the testator himself* are admissible only when they were made so near the time of the execution of the will as to become a part of the *res gestæ*," and he refers for the last proposition to *Smith v. Fenner, supra*. (See 2 *Green. Ev.* § 690.) Nothing could be more incongruous than the different branches of this section. To say, that the *insanity* of the testator, subsequent to the making of the will, may be proved, but that the declarations of the testator are inadmissible for the purpose of proving it is not a little extraordinary. It admits the fact, but excludes the most common and appropriate evidence to establish it.

This incongruity, and the citation of the case of *Smith v. Fenner*, where the declarations were offered not to prove insanity or mental imbecility, but fraud and circumvention, shows that the attention of the learned author was not directed to the distinction I have alluded to. The first position advanced by Mr. Greenleaf in this passage, viz: that the insanity or incapacity of the testator *after* the execution of the will may be proved,

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not as important in itself, but as a means of arriving at his condition when the will was executed, seems to be sustained by authority. (*Dickinson v. Barber*, 9 Mass. 225; *Grant v. Thompson*, 4 Conn. R. 203; *Irish v. Smith*, 8 Serg. & Rawle, 573.) But the latter, that this cannot be established by the conversation or declarations of the testator himself, is in conflict with numerous cases. In *Stevens v. Van Cleve*, (4 Wash. C. C. R. 262,) the question arose, and Washington, J. said, "The only point of time to be looked at by the jury, at which the capacity of the testator is to be tested, is that, *when the will was executed*. He may have been incapable to make a will at any time before or after that period, and the law permits evidence of such prior and subsequent incapacity to be given. But unless it *bear upon* that period, and is of such a nature as to show incompetency when the will was executed, it amounts to nothing." In *Rambler v. Tryon*, (7 Serg. & Rawle, 90,) upon a question of mental imbecility, the plaintiff was permitted to prove that the testator, in the absence of his wife, to whom he had devised his property, "told the witness that his father-in-law and wife plagued him to go to Lebanon: that they wanted him to give her all, or he would have no rest, and that he did not wish to go to Lebanon." The court held this proof admissible as evidence of weakness of mind, operated upon by excessive and undue importunity. It does not distinctly appear from the report of this case, whether the declaration was prior or subsequent to the making of the will; but in the subsequent case of *McTaggart v. Thompson*, (14 Pennsylv. R. 149,) it is distinctly asserted by the court, that the declaration was *after* the execution of the will. Rogers, J. says, "It is expressly ruled in *Rambler v. Tryon*, (7 Serg. & Rawle, 90,) that the declarations of the testator, *although after* the execution of the will, are evidence of imbecility of mind."

The offer in the case of *McTaggart v. Thompson* was, to prove declarations of the testator *after* the execution of the will as to the disposition of his property, "that he had ruined his family, and that he had been deceived and imposed upon by

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persons who procured him to make his will." The court held the evidence admissible. The case of *Reel v. Reel*, (1 *Hawks*, 247,) is a leading case on this subject, and one which has been supposed to conflict, and was supposed by the court which decided it to conflict with several of the cases I have cited, especially *Jackson v. Kniffen*, (2 *John*. 31,) and *Smith v. Fenner* (1 *Gallis*. 170;) but which when viewed in the light of the arrangement of the cases which is here adopted, will be seen to be in entire harmony with them. The offer in *Reel v. Reel* was to prove repeated declarations of the testator, made *after* the execution of the will, in which he stated its contents to be materially and utterly different from what they were. These declarations were offered in connection with conflicting testimony upon the point of testamentary capacity. The evidence here offered bore exclusively upon the question of the competency of the testator: and of course did not fall within the principle of those cases, which exclude declarations bearing upon questions of fraud, duress, &c. unless a part of the *res gestæ*. Hence there was no necessity, as the court seemed to suppose, for overruling the cases of *Jackson v. Kniffen* and *Smith v. Fenner*, in order to admit the evidence offered in this case. The decision of the court in holding the evidence admissible, is not in conflict so far as I have been able to discover with any adjudged case, either in this country or in England, and on the other hand is in entire harmony with what seems to be the established doctrine, that the insanity or imbecility of the testator subsequent to making the will, may be proved, in connection with other evidence, with a view to its reflex influence upon the question of his condition at the time of executing the will. Indeed, if the latter doctrine is sound it necessarily follows that the decision is right.

This conclusion is of course decisive of the present case, which is identical in principle with that of *Reel v. Reel*. Here as in that case the offer was to prove declarations of the testator, stating the contents of the will to be entirely different from what they were in fact: and these declarations were offered in



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connection with other evidence bearing upon the competency of the testator at and before the execution of the will. If evidence of the mental condition of the testator *after* the execution of the will is admissible in any case, as to his capacity when the will was executed, and the competency of such proof seems to be sustained by many authorities and contradicted by none; then it is clear that the testimony offered here should have been admitted.

It does not follow from this, that evidence of this nature is necessarily to be received, however remote it may be in point of time from the execution of the will. The object of the evidence is to show the mental state of the testator at the time when the will was executed. Of course, therefore, it is admissible only where it has a legitimate bearing upon that question: and of this the court must judge as in every other case where the relevancy of testimony is denied. If the judge can see that the evidence offered cannot justly be supposed to reflect any light upon the mental condition of the testator, at the time of making the will, he has an undoubted right to exclude it. In the present case it was impossible for the judge to say this in advance of any information as to the precise period when, and the circumstances under which the declarations proposed to be proved were made.

There is no conflict between the doctrine here advanced in regard to the admissibility of the species of evidence in question, and the rule before adverted to, which excludes it when the issue is as to the revocation of a will. The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition. To receive evidence of subsequent declarations in the former case, would be attended with all the dangers which could grow out of changes of purpose, or of external motives operating upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator.

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*Lockwood against Thorne.*

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It is unnecessary to notice the other points in the case. It may however be proper to say that the testimony offered and rejected, in regard to the two thousand acres of land in Florida, was wholly immaterial, as it would not if given have been in the least inconsistent with the will, which in terms admitted that the land had formerly belonged to William. •

The judgment of the supreme court must be reversed, and there must be a new trial of the issues.

DENIO, JOHNSON, PARKER, ALLEN and EDWARDS, Js., concurred.

GARDINER, C. J., dissented.

Judgment of the supreme court reversed and new trial ordered.

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LOCKWOOD and others *against* THORNE and others.

An account stated is conclusive upon the parties, unless impeached for fraud or mistake.

To make an account stated, it is sufficient that the account has been examined and assented to as correct by both parties. This assent may be express, or implied from circumstances.

Whether on a given state of facts the transaction constitutes a stated account is a question of law.

As a general rule, where an account showing a balance is duly rendered, he to whom it is rendered is bound, within a reasonable time, to examine the same and object if he dispute its correctness.

If he omit to do so, he will be deemed, from his silence, to have acquiesced, and be bound by it as an account stated.

Accordingly, where T. & Co., a firm in New-York, on the first of February, 1847, pursuant to custom, rendered to L. & Co., a firm in Ulster county, an account of their mutual dealings, containing a charge against the latter of \$880.48, and showing a balance due them of \$5,628.41; and L. & Co. on the 17th of

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February drew on T. & Co. for an amount corresponding with this balance, which was paid, and made no objection to the account till November following, when they brought a suit to recover the amount of the \$880.48, claiming that it was improperly charged to them; *Held*, that they could not recover without proving affirmatively mistake or fraud in the account rendered.

APPEAL from the judgment of the supreme court sitting in the third district. The action was tried before referees. On the trial it appeared that the plaintiffs, who were tanners in Ulster county, and the defendants, being leather merchants doing business in New-York, entered into a contract in March, 1844, by which the plaintiffs agreed to receive from the defendants, hides, and return them tanned into leather, at a specified price per pound, to be paid by defendants; among other things, the plaintiffs agreed that the hides should "be tanned in a good and workmanlike manner, and made to gain in weight as much as good tanners make from the same description of hides;" that the plaintiffs received hides and returned the leather under the contract, down to January, 1847; that defendants on the first of February, in each year, were accustomed to make up the accounts between the parties, and transmit the same to the plaintiffs, and that on or about the first of February, 1847, they made up an account between them and the plaintiffs, of the transactions of 1846, and sent a copy to the latter by mail. In this account the plaintiffs were charged, for "deficiency in gain of weight in tanning" sundry hides a certain number of pounds, at a price per pound specified, the sum of \$880.48, as one item; the account contained a large number of debits and credits, and showed a balance due the plaintiffs of \$5623.41. After receiving this account, and on the 17th of February, 1847, the plaintiffs made their draft on the defendants, payable at sight to the order of Jos. S. Evans, cashier, for the sum of \$5623.41, being the same as the balance shown by said account, which draft was paid by the defendants. The plaintiffs made no objection to the account, or any item of it, at or prior to drawing the draft, or at any time prior to commencing the suit. The draft did not refer to the account in terms, and by it the defendants were requested

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to charge the amount thereof to the account of the plaintiffs. In November, 1847, this suit was commenced: the declaration contained counts upon the contract, and also the common counts for work and labor. The only matter in dispute upon the trial was, whether the plaintiffs were properly chargeable under the contract, with the said sum of \$880.48, for deficiency in weight. Each party gave a good deal of evidence on this point.

The defendants also insisted that the plaintiffs could not recover, on the ground that the account, including the item in question, had been stated and settled between the parties, and that it could not be opened without proof of fraud or mistake. The referees made a report in favor of the plaintiffs for the amount of said sum of \$880.48, with interest. The supreme court, on a case made by the defendants, denied a motion to set it aside, and gave judgment for the plaintiffs. A statement of facts found by the court was incorporated with the case, in the judgment roll, and the defendants appealed to this court.

*L. Tremain*, for the appellants.

*H. Hogeboom*, for the respondents.

PARKER, J. By the contract between the parties, the plaintiffs agreed that the hides received from the defendants should not only "be tanned in a good and workmanlike manner," but also that they should be "made to gain in weight as much as good tanners make from the same description of hides." The defendants allege that the plaintiffs failed to keep the latter part of this stipulation, and that the referees erred in not finding against the plaintiffs on that issue. However preponderating may be the weight of evidence against the finding of the referees on this point, and I think it was so, it is not a matter subject to review in this court. It was a question of fact, and if it has been erroneously determined by the referees, the defendants can have no redress beyond the power of the supreme court to set aside the report as against the weight of evidence.

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The second point made by the defendants is that the referees erred in not giving legal effect to an account stated and settled between the parties, and in permitting the same to be opened without proof of fraud or mistake: and this presents properly a question of law for our decision: for whether on a given state of facts the transaction amounts to an account stated is a question of law and not of fact. (*Toland v. Sprague*, 12 *Peters*, 330.) In accordance with the established custom of the defendants to make up the accounts between them and the plaintiffs on the first day of February in each year, and to transmit the same to the plaintiffs, an account between the parties was made up and sent to the plaintiffs by mail on or about the first day of February, 1847, showing a balance due to the plaintiffs from the defendants amounting to the sum of \$5,623.41. In that account the plaintiffs were charged for deficiency in gain of weight on certain hides particularly referred to, the sum of \$880.48. After receiving said account and on or about the 17th day of February, 1847, the plaintiffs drew upon the defendants at sight for the amount of the said balance shown by the account, without objection to any part thereof, and their draft for the same was duly paid by the said defendants. The matter thus rested till November, 1847, when the plaintiffs brought this action to recover the \$880.48 charged in the account for the deficiency in weight.

It is not necessary in order to make a stated account that it should be signed by the parties. It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be express; but may be implied from circumstances. (1 *Story's Eq. Jur.* § 526.) Keeping it any length of time without objection binds the person to whom it is sent. (*Willis v. Jernegan*, 2 *Atk.* 251.) Between merchants at home, an account which has been presented and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence a stated account. (*Sherman v. Sherman*, 2 *Vern.* 276; 1 *Stor. Eq. Jur.* § 526.) Between merchants in different countries a longer time is given,

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but if no objection be made, after several opportunities of writing have occurred, it is considered an acquiescence. (2 *Atk.* 252; 2 *Ves.* 239; 3 *John. Ch. R.* 560, 575; 7 *Cranch*, 147.) What is a reasonable time is to be judged of by the habits of business at home and abroad. (1 *Story's Eq. Jur.* § 526.) The law was very fully stated by Collier, Ch. J. in *Langdon v. Roane's Adm'r*, (6 *Ala. R.* 518,) as follows: "It is said to be a general rule, that where an account is made up and rendered, he who receives it is bound to examine the same or to procure some one to examine it for him. If he admits it to be correct, it becomes a stated account and is binding on both parties—the balance being the debt which may be sued for and recovered at law upon the basis of an *insimul computassent*," "So if, instead of an express admission of the correctness of the account, the party receiving it keeps the same by him and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it as if it were a stated account. (*Philips v. Belden*, 2 *Edw. Ch.* 1.) In fact, the rule as laid down by the authorities would seem to be, that if one does not object to a stated account which has been furnished him, within a reasonable time, he shall be bound by it, unless he can show its incorrectness. (*Murray v. Toland*, 3 *John Ch.* 569; *Wilde v. Jenkins*, 4 *Paige*, 481.)" In stating the law as above extracted, the learned chief justice followed the decision in the case of *Philips v. Belden*, (2 *Edw. Ch.* 1,) where the same principles of law are clearly stated.

If this case rested upon the question of reasonable notice, I cannot doubt but the lapse of nine months after the receiving of the account before the commencement of the action, there having been made in the mean time no objection or complaint, would have been abundant to authorize the legal inference of acquiescence; particularly as the proximity of the parties to each other secured them a daily opportunity of communication by mail, and the nature of their business transactions must have brought the

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plaintiffs frequently during that time to the city, where the business of the defendants was transacted.

But this case does not rest on mere inference or acquiescence from lapse of time. There is affirmative evidence of such acquiescence. Within a few days after the account was received by the plaintiffs they drew on the defendants for the balance stated; not a general draft in round figures, but a draft for \$5623.41, the precise balance of the account as rendered. There being no other accounts between the parties, a draft in that form is as clearly indicative of an intention to draw the balance as such, as if those terms had been inserted in the draft. Here is then affirmative and I think conclusive evidence that, with the account before them, in which among other items the deduction for loss of weight was particularly stated, the plaintiffs agreed to it as a stated account, by drawing for and receiving the precise balance admitted. We are not without authority in deducing such a legal assent from the act of the plaintiffs. This precise question arose in *Toland v. Sprague*, (12 *Peters*, 300-334,) and Mr. Justice Barbour, in giving the opinion of the court, said, "We agree that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. The plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary, having claimed that balance, thereby adopted it and by his own act treated it as a stated account." (See also *Murray v. Toland*, 3 *John. Ch. R.* 569.)

The transaction then being an account stated, is conclusive upon the parties unless the plaintiff affirmatively shows fraud or mistake. The law is stated in *Philips v. Belden*, (2 *Edw. Ch. R.* 1,) that if either party attempts to impeach the settlement and to open the accounts for re-examination, either wholly or in part, and which can only be done upon the ground of fraud, mistake or error, the burthen of proof rests upon the party impeaching, and he must prove the fraud or point out the error or

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mistake on which he relies. Here no fraud or mistake was pretended. It was merely an attempt to litigate an item once settled, without a shadow of pretence that there had been any thing unfair in the settlement, or any misapprehension in regard to it.

It was well said by Chief Justice Marshall, in *Chappelanie v. Dechenaux*, (4 *Cranch*, 306,) where an attempt was made to open an account stated, "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestions supported by doubtful or by only probable testimony."

On the evidence before the referee, therefore, the defendants were entitled to judgment, and the judgment of the supreme court ought to be reversed and a new trial ordered.

JOHNSON, J., also delivered an opinion for reversal.

GARDINER, Ch. J., DENIO and EDWARDS, Js., concurred.

RUGGLES, J., was in favor of affirmance.

Judgment reversed.

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*SHOEMAKER against BENEDICT, ex'r, impleaded, &c.*

Payments made by one of the joint and several makers of a note and indorsed upon it, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defense of the statute as to the other.

Accordingly, where three made a joint and several note payable in February, 1839, and payments were made by one and indorsed upon it, in 1839, 1840, December, 1848, and January and September, 1849, and a suit was commenced upon it in July, 1850, to which one of the others pleaded the statute of limitations; *Held*, that the action was barred as against him.

APPEAL from a judgment of the supreme court. The action in the court below was by Shoemaker against Thomas A. Paine,



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Thomas Paine and Chester Paine. Chester Paine only answered. He set up the statute of limitations. The action was upon a promissory note in the following words :

"By the first day of February next, we or either of us promise to pay James Norton, or bearer, three hundred and twenty-two dollars and sixty-six cents, with use, for value received.

Paine's Hollow, March 30, 1838.

THOMAS A. PAINE,  
THOMAS PAINE,  
CHESTER PAINE."

There were five indorsements on the back of the note, as follows: February 4, 1839, "Received interest up to this date by note;" February 4, 1840, "Received interest to this date;" December 19, 1843, "Received thirty-three  $\frac{1}{10}$  dollars;" January 17, 1849, "Received twenty-five dollars for interest, left with my family;" September 18, 1849, "Received fifty dollars in a check on Mohawk Valley Bank." The action was commenced the 30th July, 1850.

On the trial before the Hon. Wm. F. Allen, a justice of the supreme court, at the Herkimer circuit, in December, 1850, the note was proved, and the defendant's counsel admitted that the several amounts appearing to be indorsed were paid on the note by the defendant, Thomas A. Paine, at the several times when said indorsements bear date, and that said indorsements were made at the times when they are respectively dated.

The counsel for the defendant insisted that the action was barred by the statute as against Chester Paine, who alone defended, and moved for a nonsuit. The plaintiff's counsel relied upon the payments so made and indorsed to take the case out of the statute. The judge held that the statute applied and that the action was barred as to Chester Paine; and as to him he nonsuited the plaintiff, who excepted.

The supreme court, sitting in the fifth district, affirmed the judgment rendered at the circuit, and the plaintiff appealed to this court.

The defendant Chester Paine died pending the action, and the respondent Benedict, as his executor, was substituted.

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The opinion of the supreme court was written by Justice Allen, and consisted of a reference to the opinion of the same court in the case of *Dunham v. Dodge*, which is reported in 10 *Barb. S. C. R.* 566.

*F. Kernan*, for the appellant. I. Part payment of a joint note by one of the makers and indorsed upon it, before the note is barred by the statute of limitations, and within six years before suit brought, takes the note out of the statute as to all the makers. (1.) This is and long has been the settled law in England. (*Perham v. Reynal*, 2 *Bing.* 306; *Burleigh v. Stott*, 8 *Barn. & Cress.* 36; *Pease v. Hirst*, 10 *id.* 122; *Chippendale v. Thurston*, 4 *Car. & Payne*, 98; *Wyatt v. Hodson*, 8 *Bing.* 309.) (2.) The law is so settled in Massachusetts. (*Hunt v. Bridg-ham*, 2 *Pick.* 581; *Frye v. Barker*, 4 *id.* 382; *Sigourney v. Dewey*, 14 *id.* 387.) (3.) This is the law in Connecticut. (*Bound v. Lathrop*, 4 *Conn. R.* 336; 8 *id.* 268; 9 *id.* 496.) (4.) This is the law in most of the other states. (*Joslyn v. Smith*, 13 *Verm. R.* 353; *Real Estate Bank v. Hartfield*, 5 *Pike*, 551; *Pike v. Warren*, 3 *Ship.* 390; *Dinsmore v. Dinsmore*, 8 *id.* 433; *Shipley v. Waterhouse*, 9 *id.* 497; *S. C.*, *Dudley*, 100, 138; *McIntire v. Oliver*, 2 *Hawks*, 209; *Walton v. Robinson*, 5 *Iredell*, 341; *Beitz v. Fuller*, 1 *McCord*, 541.) (5.) The law is not decided otherwise by the supreme court of the United States. The case of *Bell v. Morrison* does not conflict with the law as it is claimed to be by the plaintiff in this suit; upon the facts of that case, the decision was right. In that case the partnership was dissolved and the debt barred by the statute before the alleged acknowledgment by one of the partners. (*Bell v. Morrison*, 1 *Peters*, 352, 368, 371, 373.) Again, in that case there was no new promise, nor any such acknowledgment of the debt by either partner as would revive it. (1 *Peters*, 357, 8, 9, 361, 5, 6 and 7.) The decision, too, was based upon the local laws and decisions of the state of Kentucky. (6.) In this state the law has been long and uniformly held to be as claimed and relied upon by the

plaintiff. Prior to the case of *Van Keuren v. Parmelee*, there was not a case or dictum raising a doubt as to this being the law. Whatever of fluctuation there has been in the decisions, or doubts expressed by judges, has been as to the character of the promise or acknowledgment which would continue or revive the debt, and as to the power of one joint debtor to revive it against the other *after it had ceased* to be a valid demand. (6 *John.* 267; 6 *John. Ch.* 266-291; 15 *John.* 3; 5 *Wend.* 257; 7 *id.* 441; 15 *Barb.* 168; *Van Keuren v. Parmelee*, 2 *Comst.* 523.)

II. The case of *Van Keuren v. Parmelee* was entirely different from this; it does not in fact, and does not assume to, change the law as settled and understood in reference to a case like the one now before the court; and it is submitted that there are good reasons for distinguishing this case from that. (2 *Comst.* 529.) (1.) In that case the partnership had been dissolved, and the debt was barred by the statute before the promise by one of the partners, relied upon to revive the debt as to the other, was made. (*Id.* 523, 524.) (2.) There is a wide and well founded distinction upon authority between allowing the acts and promises of one joint contractor to affect the other while the debt is obligatory on all of them, and allowing them to do so after the debt is barred, and when in truth they are no longer jointly indebted. (2 *Id.* 528. *Brewster v. Hardeman*, *Dudley, Geo.* 138; *Fellows v. Gaimarin*, *id.* 100; *Steele v. Jennings*, 1 *McMullan*, 297; *Muse v. Donaldson*, 2 *Hump.* 166.) (3.) Again, part payment by one of two joint debtors, has always been regarded as more satisfactory to keep it in full force as to both than a mere promise to pay. (*Wyatt v. Hodson*, 8 *Bing.* 309; *Lord Tenterden's act*, 9 *Geo. 4th, ch.* 14; *Laws of 1849*, 638, § 110; 2 *Comst.* 527.) (4.) Upon principle this case is clearly distinguishable from that of *Van Keuren v. Parmelee*, and the plaintiff entitled to recover upon the note. The acts, declarations and promises of one joint debtor are evidence against the other, on the ground of their *joint liability for and interest in the debt*, when such acts, declarations and promises were made; they are not evidence to prove or create the joint

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obligation, but after this has been established by other proof, and while it is in force, the acts and admissions of either are evidence against all. When the debt is barred by the statute and ceases to exist, there is no longer this joint interest between those who were once joint debtors, and the acts or admissions of one should no longer be evidence against the other; to allow them to be so would in effect be permitting one to create a debt against the other. But until the note is paid or barred by the statute the joint interest between the joint makers exists, and the acts or admissions by one are evidence against all. (1 *Greenl. on Ev.* § 111, 174, 176, 177, 179; 1 *Cowen & Hill's Notes*, p. 174, n. 177; *Joslyn v. Smith*, 13 *Verm. R.* 353, 358; *Whitcomb v. Whiting*, 2 *Doug.* 652.)

*V. Owen*, for respondent. 1. The plaintiff cannot recover, because the cause of action accrued more than six years before the suit was commenced. 2. The action was upon the new promise, which was made by Thomas A. Paine only, and cannot bind Chester Paine, or his representatives. (*Van Keuren v. Parmelee*, 2 *Comst.* 523, and the cases cited; *Bell v. Morrison*, 1 *Peters*, 331; 10 *Barb.* 566, and cases there cited.) 3. After the dissolution of a copartnership the agency of one, for his fellows, ceases, except to dispose of property, adjust and pay debts, &c., but he can make no new promise, changing the prior obligation. (*Van Keuren v. Parmelee*, 2 *Comst.* 525, 6.) 4. A joint debtor never has any agency for the other at all, and cannot change, or enlarge the contract; indeed, if the contract, or if a note be altered in any material part, it vitiates the note, or contract, in respect to any one not assenting thereto. (*Chit. on Bills*, 181, 186, 10th *Am. ed.* See cases cited 2 *Coms.* 580, 1.) Should a joint debtor add to a note words extending the time of payment one or two years, it would undoubtedly vitiate. (*Chit. on Bills*, 181, 10th *Am. ed.*) If he cannot enlarge the time directly, he cannot do it indirectly. Payment, or acknowledgment, is only evidence of a promise. (*Arnold v. Downing*, 11 *Barb.* 554; *Watkins v. Stevens*, 4 *id.* 171-173; 10 *id.* 566.)

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The reasoning of Justice Bronson has been approved by Justice Allen, in the opinion in this case, reported 10 *Barb.* 566, and in 10 *id.* 325, Justice Edwards declares the reasoning unanswerable, and considers that the case overrules the case of *Whitcomb v. Whiting*, (*Doug.* 652,) and *Patterson v. Choate, Smith v. Ludlow*, and other cases cited for the appellant.

The following is the opinion in *Dunham v. Dodge*, adopted by the supreme court as the opinion in this case.

ALLEN, J. The plaintiff in this action relies upon payments by one of several makers of a promissory note, made before the statute of limitations had barred an action upon it, to take the case out of the statute as to all the makers, and continue the joint liability of all for six years from the time of the last of such payments.

Before the decision of *Van Keuren v. Parmelee*, (2 *Comst.* 523,) it would have been considered very well settled upon authority that such payments did operate to prevent the statute of limitations from attaching to the demand; that by the joint contract, there was a unity of interest, by which a quasi agency was created between the contractors, so that the admission or promise of one would have bound all. (*Whitcomb v. Whiting*, *Doug.* 652; *Patterson v. Choate*, 7 *Wend.* 441; *Hammon v. Huntley*, 4 *Coven.* 493; *Johnson v. Beardsley*, 15 *John.* 3; 6 *John. Ch.* 291; *Sigourney v. Drury*, 14 *Pick.* 387; *Perkins v. Raynal*, 2 *Bing.* 306; *Burleigh v. Stott*, 8 *B. & C.* 36; *Pease v. Hurst*, 10 *id.* 122; *Wyatt v. Hudson*, 8 *Bing.* 309; *Frye v. Barker*, 4 *Pick.* 382; *Hunt v. Bridgham*, 2 *id.* 581; *White v. Hale*, 3 *id.* 291; *Channel v. Ditchburn*, 5 *M. & W.* 494; *Griffin v. Ashley*, 1 *Car. & P.* 139; *Rew v. Petet*, 1 *A. & E.* 196; *Greenleaf v. Quincey*, 3 *Fairf. R.* 11; *Pike v. Warren*, 15 *Maine.* 893; *Joslyn v. Smith*, 13 *Verm.* 356; *Shelton v. Cocke*, *Munf.* 311; *Besley v. Fuller*, 1 *McCord*, 541; 2 *Bay*, 583.)

While the decision of *Van Keuren v. Parmelee* does not decide the precise point presented by the case before us, it involved

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principles which were necessarily decided, and which have an important bearing, if not a controlling influence, upon the decision of this cause. The judge who pronounced the opinion of the court in that case, refers to the distinctions supposed to exist between that case and this, but did not profess to lay much stress upon them. He did not, however, undertake to decide whether there were or were not distinctions between the two cases which would influence the decision, and bring them within different rules. His argument was adapted to the settlement of general principles, and the application of those principles to the case then under consideration; and he designedly left the question open as to what other cases those principles should govern, and what facts and circumstances would operate to place a case in other respects similar to that decided, without the rule then established. But the court in that case, as the court of last resort in the state, reviewed a series of decisions of the courts of this state and of others and of England, and established as the law of this state, principles inconsistent with many of the cases which have been followed by our courts as law, and has in some respects made the law more self-consistent. They have adopted, to a great extent, the views of Mr. Justice Story, as expressed in *Bell v. Morrison*, (1 *Peters*, 351,) which the supreme court of this state, acting upon the principle of *stare decisis*, had not considered proper to do. (*Dean v. Hewit*, 5 *Wend.* 257.)

The cases cited above, in which it has been held that the promise of one joint debtor was sufficient to take the case out of the statute of limitations and revive or continue the debt as against all, have followed the decision of *Whitcomb v. Whiting*, and have merely applied the principle of that case to cases substantially the same, or supposed to be so, and only differing in circumstances. They have depended upon the presumed agency of one to do an act to bind the other debtors, growing out of the joinder in the contract and unity of interest. The leading case was decided at a time when the statute of limitations was looked upon with disfavor by the courts, and when any acknowledgment, even the slightest, of the existence of a debt, was sufficient to

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deprive the party of the benefit of the statute, although the acknowledgment was made under circumstances showing that the debtor did not intend to recognize or admit an existing intention or liability to pay. (*Freeman v. Fenton*, *Comp.* 548; *Bryan v. Horseman*, 4 *East*, 599; *Lawrence v. Worrall*, *Peake*, 93; *Beecher v. Hannay*, 4 *East*, 599, *n. c.*; *Clark v. Bradshall*, 3 *Esp.* 155.) The courts were willing to lay hold of any circumstance which tended to show the existence of a demand, or that a demand once existing had not been paid, to take the case out of the statute; and hence perhaps they were the more ready to imply an agency which would not have been implied for any other purpose or under any other circumstances, and bind one person by the acts of another, whom he never designed to constitute his agent for any purpose, and to hold that a partial payment by one, as it negatived to some extent the presumption of a prior payment of the debt, was evidence against all that the debt had not been paid and was an existing liability. The statute was treated as raising a presumption of payment, and that presumption being rebutted, the statute was treated as no bar. The early cases in England upon this subject have not been generally followed in this country, and are no longer considered as law in that country; but the statute of limitations has been treated not as merely raising a presumption of payment, but as a statute of repose. It has been held that a circumstance or expression from which a probable or possible inference could be drawn of the acknowledgment of a debt was not sufficient to overcome the defense under it. (*Sands v. Gelston*, 15 *John.* 511; *Wetzell v. Bussard*, 11 *Wheat.* 309; *Bangs v. Hall*, 2 *Pick.* 368.) It is now held that there must be an express promise or a clear recognition of the present existence of the demand, from which a promise may be implied. (*Stafford v. Richardson*, 15 *Wend.* 302.) There must be an admission that there is a subsisting debt, which the debtor is willing to pay.

It needs no authority that an admission, to be operative, must be made by the party to be affected, or by an authorized agent. It is substantially a new contract, upon which the action is

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brought when it is sought to be sustained by evidence of a new promise, when but for such new promise it would have been barred by the statute of limitations. (*Green v. Crane*, 2 *Ld. Raym.* 1101; *Bell v. Morrison*, *supra*; *Thompson v. Peter*, 12 *Wheat.* 565; *Dean v. Hewit*, *supra*; *Tompkins v. Gardner*, 1 *Denio*, 247.)

The only question then is, whether the joint contract creates an agency in one of several joint debtors to continue a debt or renew a debt already barred against all, and prevent the statute of limitations from attaching by a new promise, express or implied; or in other words, whether such joint debtor is authorized in virtue of his relation to the parties, to make such new contract which shall bind them all. The cases in England, and in this state prior to *Van Keuren v. Parmelee*, have followed the case of *Whitcomb v. Whiting*, and held that such agency did exist. But the decisions were made without adverting to the fact that the decision of *Whitcomb v. Whiting*, while it was perhaps not inconsistent with the principles upon which the courts proceeded at the time it was pronounced, as to the construction to be put upon and the effect to be given to the statute of limitations, was inconsistent with the more modern decisions under the statute upon the subject, and with the case of *Green v. Crane*, and other authorities to the same effect. The decision of the court in *Van Keuren v. Parmelee*, without reference to the reasoning of the judge by whom the opinion was delivered, necessarily decides or recognizes as law: 1st. That the action is substantially, though not in form, upon the new promise, and that such promise is not a mere continuation of the original promise, but a new contract springing out of and supported by the original consideration; 2d. That to continue or renew the debt, there must be an express promise to pay or an acknowledgment of the existence of the debt, with the admission or recognition of an existing liability to pay it from which a new promise may be inferred; 3d. That such acknowledgment or promise, to take a debt out of the statute, must be made by the party to be charged or by some person authorized by him; and 4th. That there is no



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mutual agency between joint debtors by reason of the joint contract, which will authorize one to act for and to bind the others in a manner to vary or extend their liability. These questions, with the exception perhaps of the first, were directly involved in the case and necessarily decided, and the decision of the court was unanimous.

Do the points, in which this case differs from that decided by the court of appeals, take it without the principles decided and without the statute of limitations? I think not.

*First.* One point of difference is, that in this case partial payments and not a promise or naked acknowledgment of the existence of the debt, are relied upon to take the case out of the statute. But partial payments are only available as facts from which an admission of the existence of the entire debt and a present liability to pay may be inferred. As a fact by itself, a payment only proves the existence of the debt, to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money as interest, it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is that it is a deliberate act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is nevertheless only reliable as evidence of *a promise*, or from which a promise may be implied. Any other evidence which establishes such promise would be equally efficacious, and most assuredly a deliberate written acknowledgment of the existence of a debt and promise to pay, is of as high a character as evidence of a partial payment to defeat the statute of limitations. In either case the question is as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the debt is renewed; and without a promise express or implied, it is not renewed. The question still recurs, who is authorized to make such promise? If one joint debtor could bind his co-debtors to a new contract by implication, as by a

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payment of a part of a debt for which they were jointly liable, he could do it directly by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly which cannot be done directly. If one debtor could bind his co-debtors by an unconditional promise, he could by a conditional promise, and a man might find himself a party to a contract to the condition of which he would be a stranger.

X *Second.* Another fact relied upon to distinguish this case from *Van Keuren v. Parmelee* is, that the payments were made before the statute of limitations had attached to the debt, and while the liability of all confessedly existed. In some cases in Massachusetts, this, as well as the fact that the revival or continuance of the debt was effected by payments from which a promise was implied rather than by express promises, were commented upon by the court as important points. But I do not understand that the cases were decided upon the ground that those circumstances really introduced a new element or brought the cases within a different principle. The decisions in truth were based upon the authority of the decisions of the English courts, and prior decisions in the courts of that state. That a promise made while the statute of limitations is running, is to be construed and acted upon in the same manner as if made after the statute has attached, is decided in *Dean v. Hewit*, and *Tompkins v. Gardner*, *supra*. If the promise is conditional, the condition must be performed before the liability attaches so as to authorize an action. It does not, as a recognition of the existence of the debt, revive it absolutely from the time of the conditional promise. And in principle, I see not why a promise made before the statute has attached to a debt, should be obligatory when made by one of several joint debtors, when it would not be obligatory if made after the action was barred. The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required

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to make the promise before as after the six years have elapsed. Can it be said that one of several debtors can on the last day of the sixth year, by a payment small or large, or by a new promise, either express or implied, so affect the rights of his co-debtors as to continue their liability for another space of six years, without their knowledge or assent, or any authority from them, save that to be implied from the fact that they are at the time jointly liable upon the same contract, and yet that on the very next day, without any act of the parties, such authority ceases to exist? If so, I am unable to discover upon what principle. And may the debt be thus revived from six years to six years through all time, or if not, what limit is put to the authority? If any agency is created, it continues until revoked. The decision of *Van Keuren v. Parmelee*, is upon the ground that no agency ever existed, not that an agency once existing had been revoked.

The debt in this case is joint and several. The several liability of the party making the payments is doubtless continued by his own acts; but as against the others, I cannot, without disregarding *Van Keuren v. Parmelee*, or drawing distinctions for which I can find no reason, come to any conclusion other than that the action is barred by the statute. See also *Lewis v. Woodworth*, (2 Comst. 512.) In this latter case it was held that one of two joint contractors could not be deprived of a defense by the admission of the other; that one had not power to increase or extend the liability of the other beyond the terms of the contract. To hold that one joint debtor could by his acts deprive his co-debtors of a defense under the statute of limitations, and could renew and extend his liability by a new contract, would be directly inconsistent with the principles decided in this case.

GARDINER, Ch. J., and SELDEN, PARKER, EDWARDS and ALLEN, Js., for the reasons given in the foregoing opinion, were in favor of affirming the judgment of the supreme court.

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DENIO, J. (dissenting.) It does not appear that the relation of principal and surety, or that of partners, at any time existed among the makers of this note, nor that there has been any change in their situation *inter sese* since it was made, whatever that situation then was. There has been no period of six years during which a payment was not made and indorsed, from the giving of the note to the time of the commencement of the action. There is no evidence whether the payments, which are admitted to have been all made by Thomas A. Paine, were made with or without the knowledge or concurrence of the other defendants, unless the fact that the plaintiff omitted to give any proof upon that point establishes the want of such concurrence. If the defense in this action is made out, it follows that in the case of a note past due, made by several persons, where the holder has received regular annual or other periodical payments of interest or regular instalments of principal by the hands of one of the debtors, he will lose his remedy against the others for any balance which may remain, after the lapse of six years, unless he is able to show an agency in the party so paying, for his co-debtors, other and beyond what may be implied from the fact of their joint indebtedness. With the conviction which I entertain that such an adjudication would be contrary to the generally received understanding of the legal profession and the community, as it would certainly be inconsistent with a great many adjudged cases, both in England and in this country, I am of opinion that this court should not confirm it, unless constrained to do so by precedents which it has no right to disregard. The defendant's counsel of course relies upon the decision of this court in *Van Keuren v. Parmelee*, (2 Comst. 523.) That was an action on a note made by a copartnership firm, consisting of three persons, which was dissolved about a year after the note became payable. About nine years after the dissolution, and four years after an action on the note had been barred by the statute of limitations, one of the former copartners acknowledged the existence of the debt and promised to pay it. The action was against the three joint makers, and the two who

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had not made any promise pleaded the statute of limitations; and this court adjudged that the action was barred. Unless there is a distinction founded upon principle between that case and the present, the judgment of the supreme court, which was made in professed obedience to the former, is right and ought to be affirmed. The plaintiff's counsel seeks to distinguish the cases by referring to two particular circumstances in which they differ. First, the evidence to avoid the statute in the former case in this court was a parol promise, while in the one under review it consisted of payments by one of the debtors, which are claimed to be more authentic acts and to be entitled upon this question to a different consideration; and second, that in this case there was never a lapse of six years without a payment, which is at least equivalent to a new promise, and that, therefore, the demand was never barred, if a promise by one joint debtor is an answer to the statute in any case. It was also remarked that the decision in *Van Keuren v. Parmelee* proceeded very much upon the revocation of the authority of the several partners to bind their associates, which was effected by the dissolution of the copartnership; and it is correctly said that no such feature exists in the case now before the court.

That the act of making a partial payment on account of a moneyed demand, in the ordinary course of business, is a more satisfactory recognition of the continued existence of such demand, than evidence of declarations respecting it, cannot be denied; and for that reason, it is seen that in the recent acts which require a promise to avoid the statute to be in writing, the effect of partial payments is left unaltered. (*Stat.* 1849, p. 638, § 110; *Stat.* 9 Geo. 4, ch. 14.) All the cases agree that a payment is equivalent to a new promise to pay the residue of the debt. Upon that point there is no controversy; but the question here is as to the authority of T. A. Paine to affect the rights of his co-debtors by any thing which he could do. It is unimportant whether the act be a promise in terms or a payment of part of the debt. If he was unable from want of authority to change the situation of the others, it cannot be affected

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by any act of his, however authentic it may be. So as to the absence of any partnership relation in this case. Partners have a certain authority to affect the rights of their copartners by acts within the scope of the common business, which ceases when the company is dissolved. There having never been any copartnership among the makers of this note, their relation to each other is substantially the same as that of partners who have dissolved their connection after contracting a debt. In both cases they are simply joint debtors, without any other authority in respect to each other than what results from that relationship.

It remains to consider whether there is a distinction in principle between payments or promises made by one of several joint debtors at a time when the demand was unaffected by the statute, and such as are made after it has attached. The eminent judge who delivered the published opinion of the court, in *Van Keuren v. Parmelee*, though he does not lay great stress on the distinction, is yet careful to point out that the promise in that case was made after the demand had been barred by the operation of the statute. He refers prominently to it in the statement of facts, and remarks that it must strike one with astonishment that promises by one of the debtors "made at such a time, and under such circumstances," should bind them all. In alluding to this difference further on, he says, that if it should be held a sound distinction, the defense in that case would be sustained, "for the statute had run upon the claim long before the new promise was made." In distinguishing the case before him from *Whitcomb v. Whiting*, (*Doug.* 652,) he remarks that "it does not appear in that case that the action was barred prior to the payment." Now, although much of the reasoning of the learned judge would be fatal to the plaintiff in the case now under review, and it is perhaps probable that he would have considered the demand barred though the promise had been made before the statute had run; yet it cannot be affirmed that such would have been the opinion of the court. There was another opinion delivered which the reporter has not published; and it may be that the judge who prepared it, and a majority

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of the court placed the decision upon the very distinction under examination. They clearly might have done so. The case of *Whitcomb v. Whiting* was adjudged more than seventy years ago, and its authority is not weakened in my estimation by the consideration that it was made by that very eminent judge, Lord Mansfield. It decided that in the case of joint debtors, if one make a payment or a promise to pay the debt within six years before the commencement of the suit, it avoids the bar of the statute as to all; the one, as Lord Mansfield observed, acting virtually as the agent for the rest. This case has been steadily followed in the English courts to the present day; for though some cases which might be considered as embraced by its principle have been distinguished, as *Brandram v. Wharton*, (1 Barn. & Ald. 463,) and *Atkins v. Tredgold*, (2 Barn. & Cress. 23,) yet it has maintained its ground and is at this day considered as the settled law. (*Perham v. Raynal*, 2 Bing. 306; *Pritchard v. Draper*, 1 Rus. & Myl. 191.) In this state the case of *Whitcomb v. Whiting* has been repeatedly acted upon, and was never questioned until the decision in *Van Keuren v. Parmelee*. The doctrine of that judgment was affirmed and followed in the following cases in the late supreme court and the court of chancery: *Smith v. Ludlow*, (6 John. 267;) *Johnson v. Beardslee*, (15 id. 3;) *Hammon v. Huntley*, (4 Cowen, 493;) *Patterson v. Choate*, (7 Wend. 441;) *Roosevelt v. Mark*, (6 John. Ch. 266, 291.) In the three earliest of these cases, the one in Douglass was referred to by the court as an authority for its decision, and the later cases were based upon the authority of those which had preceded them in this state. In none of them was the distinction now attempted to be maintained adverted to, nor does the attention of the court seem to have been called to it. It is certainly competent for a court of ultimate resort to reconsider, and for good reasons to overrule any course of decision of the subordinate tribunals; and if we could regard this court in *Van Keuren v. Parmelee* as having passed such a judgment upon this series of adjudications, it would be our duty to carry into effect and apply it to this and to all future

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cases. But in my opinion the more just conclusion is that the doctrine of *Whitcomb v. Whiting* has only been *limited* in its application so as to exclude cases like that of *Van Keuren v. Parmelee*, when the promise relied on was made after the demand had been barred by the statute of limitations. There are weighty reasons for thus restricting the doctrine. When six years have elapsed without an acknowledgment or promise to pay, there is a presumption of fact of considerable strength that the demand has been satisfied. The statute declares that this presumption shall be conclusive against the creditor unless the case is within some of the exceptions. There is in such a case a substantial reason for holding that a new contract is necessary to enable the creditor to get rid of the bar of the statute; and if a new contract is required all the parties to be charged should concur in making it. When the statute has run, the privity which existed between the co-debtors is extinguished, and there is not in principle any reason why, after that, one should be able to bind the others by an acknowledgment, a payment or an actual promise. In very many contracts, while the obligation of the debtors is joint as it regards the creditor, as between the debtors themselves, one of them ought to pay. The others have a right to know when the statute has worked an extinguishment of their liability, and to rely upon the discharge wrought by it. When they find that the time of limitation has elapsed without any thing having taken place which assumed the continued obligation of the contract, it is fit that the discharge which the law has provided should not be liable to be defeated by the subsequent act of another, in which they did not participate and which they could not control. This idea was glanced at in *Atkins v. Tredgold*, already referred to. One of the joint debtors had died, and afterwards and after the time of limitation had passed, the survivors made payments, and the creditor brought an action against the executors of the deceased, relying upon the payments made by the survivor as a promise to take the case out of the statute. Chief Justice Abbot said that a decision in favor of the plaintiff would introduce great difficulty in administering the affairs of



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testators. "Suppose," said he, "an executor to have waited six years and then, no claim having been made, to dispose of the assets in payment of legacies. He might, if the plaintiffs were allowed to prevail, be subsequently rendered liable to the payment of demands to any amount by the acknowledgment of a person originally joint debtor with the testator. The inconvenience and hardship arising from such a liability satisfies me that the principle of *Whitcomb v. Whiting* ought not to be extended to this case." Bailey, J., placed his opinion in part upon the very distinction upon which I am insisting. "Here," he says, "the statute appears to have attached before the payment was made by Robert Tredgold, [the survivor;] and, therefore, John Tredgold, [the testator,] being at that time protected could not be subjected to any new obligation by the act of Robert." There is a manifest incongruity in a rule which shall hold a debtor entirely discharged at one time, and consider him liable at a subsequent period, on account of an act or declaration to which he was not privy. On this ground I entirely concur in the judgment in *Van Keuren v. Parmelee*. It is right upon principle and consistent with sound policy; and it can be sustained moreover without entirely overturning a series of adjudications almost coeval with the political existence of the state. We have only to say that when the principle of *Whitcomb v. Whiting* has been applied to cases where the payment or promise was made after the demand was barred, it was misapplied, and the attention of the court not having been called to the distinctions referred to, it cannot be said that it would not have been recognized had it been insisted on. The report in Douglas does not show whether the payment was before or after the statute had run. In *Atkins v. Tredgold*, just referred to, Bailey, J. and Holroyd, J. understood it to have been made before the statute had attached and while all the parties remained liable on the original undertaking. There is no case in England or in this state where the distinction upon which I proceed has been repudiated. In *Bell v. Morrison*, (1 Peters, 352,) which is a case much relied upon by the court in *Van Keuren*

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v. *Parmelee*, and by the defendant's counsel here, Judge Story was particularly careful to apply his reasoning to the case of a demand barred by the statute. "*When the statute has run,*" he says, "against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist." Again, "The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted debt; we mean admitted by the whole partnership or *unbarred by the statute*; but whether he can by his sole act, *after the action is barred by the lapse of time*, revive it against all the partners, without any new authority communicated to him for this purpose." "When the statute of limitations *has once run* against a debt the cause of action against the partnership is gone. The acknowledgment if it is to operate at all is to create a new cause of action; to revive a debt which is extinct, and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then in its essence the creation of a new right and not the enforcement of an old one."

Having thus shown that in all the cases where the efficacy of a new promise by one of several joint debtors to take a case out of the statute of limitations, has been denied, the period of limitation had elapsed before the promise was made, and that the circumstance that the statute had attached has been relied on in each of these cases, it is not incumbent on me to explain the nature of the agency by which such a promise by one debtor is held effectual when made within the period of limitation. It is enough to vouch the uniform and consistent course of adjudications by which that principle has been established. Should it be said that the relation of joint debtors does not enable one of them to modify the joint contract without the concurrence of the others, the answer is that, if it be a modification, it is settled law that one joint debtor is competent to effect it. The law of limitations is peculiar. Its object is to protect parties against stale demands where the defense has become unavailable by lapse

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Shoemaker *against* Benedict.

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of time. It is a branch of that law as well settled by authority, as it is reasonable and just in principle, that where one of the joint debtors has made a payment or a fresh promise to pay, within the period of limitation, a new date is assigned to the cause of action for the purpose of reckoning the time of limitation. But the same general principle exists in many other cases, where an acknowledgment by one of several who are jointly concerned is binding on the others. It has been applied to the case of co-trespassers, the joint trespass being first established; (*The King v. The Inhabitants of Hardwick*, 11 East, 578;) to cases of conspiracy and other like cases; (*Perham v. Raynal*, *supra*; *Crary v. Sprague*, 12 Wend. 41.) There is a privity of a certain kind between joint debtors while the original obligation remains in force. Either has a right to pay the debt or any part of it, and such payment does something more than extinguish the joint demand. It creates a new cause of action in favor of the party paying, against the other debtors for contribution, or for the whole amount paid in the case of payment by a surety.

I have not examined the late cases in the supreme court on the principal question, because they are not in harmony with each other, and are too recent to have been extensively acted upon. (*Bogert v. Vermilya*, 10 Barb. 32; *Dunham v. Dodge*, *id.* 566; *Reid v. McNaughton*, 15 *id.* 168.) Much able reasoning and a reference to many authorities which I have not thought it necessary to notice will be found in the opinions of the learned judges.

In conclusion, I think it right to say that where a principle of law of frequent application and of extensive influence in the profession and among business men, has been constantly and frequently held for a long course of years, it is eminently indiscreet and unsafe, to depart from it, upon any notion that it is inconsistent with some other supposed theoretical principle. We ought not to forget that upon a great variety of legal questions, including the one under consideration, the only resort of the citizen is to precedents afforded by the judgments of the courts.

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*Stanton against Kline.*

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If they cannot rely upon these, they are, for aught I can see, in no better condition than the subjects of a country whose laws exist in the unlimited discretion of the magistrate. If a legal rule is found to be inconvenient, or otherwise impolitic, the legislature has ample power to change it, and such change will necessarily be prospective; but if this be done by the courts, the new rule is at once applied to transactions which have passed, and which were entered into when the law was understood to be different.

I am therefore in favor of reversing the judgment of the supreme court.

JOHNSON, J., concurred with DENIO, J.

Judgment affirmed.

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*STANTON against KLINE and others.*

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In foreclosing a mortgage by advertisement pursuant to the statute, it is not requisite that copies of the notice of sale should be served on the parties entitled thereto personally, or by leaving the same at their dwellings, *though they reside in the same place* with the party foreclosing, or his attorney.

In such case, it is a compliance with the statute, if copies of the notice are deposited in the post office at the place where the parties reside, directed to them respectively at such place, twenty-eight days prior to the time specified for the sale.

ACTION to recover the possession of real estate situate in the city of Syracuse. The cause was tried before a referee.

The plaintiff claimed title under and by virtue of a sale and purchase of the premises, upon the foreclosure by advertisement pursuant to the statute of a mortgage upon the same executed by John B. Kline. The defendants were grantees from Kline, the mortgagor, subsequent to the mortgage and before its fore-

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*Stanton against Cline.*

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closure, of the premises. When the mortgage was foreclosed the owner of it and the defendants resided in Syracuse.

On the trial the plaintiff offered in evidence an affidavit made by the person owning the mortgage when it was foreclosed, stating that he resided at Syracuse; that on the 13th of March, 1849, (which was more than 28 days before the day of sale) he served copies of the published notice of sale on the defendants respectively, by depositing the same in the post office at Syracuse, properly folded and directed to them respectively at the city of Syracuse, where they respectively then resided. This evidence was objected to by the counsel for the defendants, on the ground that all the parties resided in Syracuse, and that where the parties resided in the same place the service of a notice by depositing it in the post office at such place was not a compliance with the statute. The referee sustained the objection and excluded the evidence, and the counsel for the plaintiff excepted. No further proof was offered or given of service of notice of the foreclosure on the defendants, the grantees of the mortgagor.

The referee ordered judgment in favor of the defendants. The plaintiff appealed to the supreme court, which, sitting in the fifth district, affirmed the judgment. He appealed to this court.

*B. Davis Noxon*, for the appellant.

*Geo. F. Comstock*, for the respondents.

GARDINER, Ch. J. There was but one exception taken before the referee, or discussed by the supreme court in the opinion before us. This exception was to the decision of the referee rejecting the affidavit of the service of notice of the foreclosure and sale of the mortgaged premises, upon the *ground* that the notices were served by a deposit in the post office at Syracuse, where the defendants, or the parties to be affected by them *resided*. The objection was specific, and sustained for the reason assigned, and for no other. The question therefore presented involves merely the construction to be given to the

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3d section of the act of 1844 (chap. 346,) providing for the foreclosure of mortgages. That section declares that notice may be served upon the mortgagor, his grantees and subsequent incumbrancers, *personally*, or by leaving the same at the dwelling house of the person to be charged therewith, fourteen days at least, prior to the time therein specified for such sale, "or by serving a copy of such notice upon such persons at least 28 days prior to the time therein specified for the sale, by *depositing the same* in the post office, properly folded and directed to the said persons, at their respective places of residence." There is no ambiguity in this language. The legislature have not made the validity of the notice to depend upon the location of the post office, but upon a deposit therein of a notice properly folded and directed to "said persons at their respective places of residence." This was literally performed in this case. The parties resided within the bounds of Syracuse; and notices properly folded and directed, were deposited for them in the post office at that place.

It is not denied, that if regard is had merely to the language of the statute, legal notice was given in this case; but it is said that acts of the legislature may be restrained, enlarged, and the letter disregarded, by construction. This may be true where the intent of the makers of the law is manifest, or where the construction according to the terms of the act would be unreasonable or absurd. But this doctrine has no application to this statute, that I can perceive. There is nothing more unreasonable in directing notice by depositing it in the post office according to the provisions of this statute, than in making publication in a newspaper, and posting upon the door of a court house, equivalent to a personal notice. Such was the former law in relation to this subject. The legislature by this act have superadded to the requirements of the law then existing, personal notice, or as its equivalent, a notice of the same facts, deposited in a post office, in the manner prescribed in the statute. The mortgagee has his election as to the mode in which the notice shall be given. There is nothing therefore in the previ-

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ous law or in the nature of the proceedings, to induce the supposition that the legislature intended any thing more than it has said. The statute in relation to notices to indorsers by mail, which has been referred to, recognizes, in terms, the existing law upon that subject, which required *personal* notice, where the parties resided in the *same* place. It only professes to regulate notices "where the same *may be given*, by sending the same by mail," and of course, only applies to cases where the residences of the holder and indorser are different.

Again, the construction claimed for this law by the respondent, instead of avoiding an absurdity, leads in practice to one. In this case, if the plaintiff had gone to an adjoining town and deposited the same notice, with the same direction, the service would have been perfect. The notice as it is urged, would then have been transmitted by mail; yet the chances of its reception by the mortgagor or his grantees would be less, obviously, than if it had been deposited at Syracuse, where both parties resided. The truth is, that a letter deposited in an office, is in every reasonable sense "transmitted," whether the person addressed resides in the same place or at a different one. The parties in both cases avail themselves of the services of the same public agent acting under the same official responsibility. The only difference is, that in one case the letter is put into a mail bag, and in the other into a box for delivery. But it is unnecessary to consider this point. The statute under consideration directs the notice to be *deposited*, and is silent upon the question of transmission.

I see no reason for departing from the plain language of this statute, and am therefore of the opinion that the judgment should be reversed and a new trial ordered.

PARKER, J., also delivered an opinion, to the same effect as the foregoing.

RUGGLES, JOHNSON and EDWARDS, Js., concurred.

DENIO and ALLEN, Js., dissented.

Judgment reversed.

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*Babcock against Beman.*

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**BABCOCK and others *against* BEMAN.**

An officer of a corporation, to whose order, as such, a note executed to it is payable, and who indorses the note, adding to his name his official character, and negotiates it on behalf of the corporation, is not personally responsible as indorser.

The effect of such indorsement is merely to transfer the paper.

Accordingly where a note was payable to the order of "R. Beman, *Treas.*," and he being the treasurer of a corporation with authority as such to receive and transfer the note, indorsed it "R. Beman, Treasurer," and delivered it to the plaintiffs, who received it on account of a debt due them from the corporation, with notice of the capacity in which Beman acted; *Held*, that he was not individually liable as an indorser of the note.

APPEAL from a judgment of the New-York common pleas. Babcock and others sued Beman as indorser of a promissory note made by Adam Smith & Co. and payable to Beman. The complaint set forth the facts necessary to charge the defendant as indorser, taking no notice of the addition annexed to his name in the body of the note and in the indorsement, as hereafter mentioned. The answer averred that the note and indorsement were in the following words :

"Four months after date we promise to pay to the order of R. Beman, *Treas.*, five hundred dollars, value received.

ADAM SMITH & Co."

Indorsed, "R. Beman, *Treasurer.*"

The answer further alleged that the defendant was the treasurer of the Union Manufacturing Company at Raritan, a corporation created under the laws of New-Jersey, and as such had authority to receive the note and to indorse it to the plaintiffs, of which they had notice; that the company was indebted to the plaintiffs for goods sold; that the defendant, having received the note as treasurer of the company, indorsed it as treasurer, and not individually, and that the plaintiffs received it as an obligation of the company, on account of said debt, and not otherwise.



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Babcock *against* Beman.

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The plaintiffs demurred, alleging that the answer did not set forth any defense. The common pleas gave judgment for the defendant; and the plaintiffs appealed to this court.

*A. F. Smith*, for the appellants.

*Thomas Darlington*, for the respondent.

DENIO, J. The endorsement of a promissory note or bill of exchange effects two different and distinct purposes. It is a present transfer and assignment of the paper to the indorsee, and an executory contract by which the indorser agrees, upon certain conditions, to pay the amount of the note or bill himself. There can be no regular indorsement which does not *ipso facto* transfer the paper; but it is not absolutely essential that it should also contain the collateral contract. (*Chitty on Bills*, 254; *Rice v. Stearns*, 3 Mass. 225.) The defendant in this case indorsed the note in question by writing his name upon it, and adding the word treasurer, and the note itself was payable to him, with the addition of the usual abbreviation of the same word. The answer shows that the defendant when he made the indorsement was the treasurer of a manufacturing corporation, and that this was known to the plaintiffs, who received the note thus indorsed on account of a demand which they had against the corporation. The question is whether this was a qualified indorsement, passing, as it clearly did, the interest in the note, but without any other contract on the part of the defendant. This question was decided against the plaintiffs in the supreme court more than thirty years ago, and has since been acquiesced in by the profession, and, I have no doubt, has been extensively acted on by business men. In *Mott v. Hicks*, (1 Cowen, 513,) the only material question was, whether a witness named Houseman was competent to testify, he having been objected to on the ground of interest. He had indorsed a note made by a manufacturing corporation, payable to his order, adding to his name

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the word agent. His name as payee in the note had no addition annexed to it, but it was proved that the plaintiff was privy to the consideration upon which it was given and indorsed; and that consideration was a debt due from the corporation. If Houseman was personally liable on this indorsement, he was interested and incompetent as a witness; otherwise he was not. The court held that it was a qualified indorsement, operating as a transfer of the note, but not containing a contract to pay. Chief Justice Savage dissented, on the ground that it had not been proved, except by Houseman himself, that he was agent of the company, and that the note was payable to him individually. In these two particulars the situation of this defendant is more favorable than that of Houseman. It has been held that an indorsement of a note to the cashier of a moneyed corporation, by adding the word cashier to his name in the indorsement, is a transfer to the corporation, where that was the design of the transaction. (*Waterliet Bank v. White*, 1 Denio, 608.) So, this note before the endorsement may be considered as having been the property of the manufacturing corporation, it being substantially averred that such was the nature and intent of the transaction upon which it was given. The case of *Mott v. Hicks* is, therefore, a direct adjudication upon this very point, by the highest court of original jurisdiction in this state; and it has been acquiesced in and regarded as the law for a great length of time. The question was in the highest degree practical, and of more frequent occurrence than almost any other. It, moreover, related to commercial paper, in respect to which it is of the utmost importance that the decisions of the courts should be stable, so that they may be relied on with confidence by the community. We should be therefore most reluctant to depart from the principle of the case, even could it be successfully questioned as not in harmony with legal analogies or antecedent cases. We think, however, it is not subject to any such criticism. It has been followed in principle in *Brockway v. Allen*, (17 Wendell, 41,) and in *Hicks v. Hinde*, (9 Barbour's S. C.

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*Rep.* 528,) and has not been questioned, so far as we know, by any case.

The judgment of the common pleas should therefore be affirmed.

EDWARDS, J., also delivered an opinion in favor of affirmance.

JOHNSON, PARKER and ALLEN, Js., concurred.

SELDEN, J., was in favor of reversing the judgment.

GARDINER, Ch. J., and RUGGLES, J., took no part in the decision.

Judgment affirmed.

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THE COMMERCIAL BANK OF PENNSYLVANIA *against* THE  
UNION BANK OF NEW-YORK.

A motion at the trial to suppress the whole of a deposition, on the ground that some of the interrogatories and parts of the deposition are improper, should be denied.

If any part of the deposition is competent, the objection should be confined to that which is not so.

Where pertinent evidence is given in answer to the general interrogatory, to which the attention of the opposing counsel was not called by the others, if he desire to cross-examine the witness as to such evidence, he should apply to the court for relief before the trial. *Per* ALLEN, J.

It is not a ground for suppressing the whole deposition on the trial.

If any part of the evidence so given is incompetent or impertinent, such part may be excluded.

Witnesses may be examined on commission as to an original paper, by annexing a copy to the interrogatories for the purpose of reference, description and identification, and producing the original on the examination of the witness. It is not indispensable that the original be annexed to the interrogatories. *Per* ALLEN, J.

The refusal to suppress the deposition of a witness at the trial, where it was

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proved that the attorney of the party examining him, at the request of the witness and before he was sworn, wrote down for him at his dictation the substance of what he afterwards testified to in answer to the interrogatories, is not error; it goes to the credibility of the evidence.

If the witness was imposed upon, or any fact was mis-stated, colored or concealed, the court, on motion for that purpose, might set aside the deposition and order the commission to be executed anew or grant other appropriate relief. *Per ALLEN, J.*

A bank receiving and upon good consideration assuming the collection of a bill or note, is liable for any default of its agents or correspondents in collecting or paying over the proceeds, or in charging the parties thereto, unless there be an agreement to the contrary.

A bank to which a bill is indorsed and transmitted by the owner for collection, and which has a special interest in the draft and proceeds, can sustain an action against an agent employed by it to collect the same for default in paying over the proceeds or in charging the parties.

It is sufficient that the draft was indorsed to such bank, and it agreed with the owner to collect it, to enable it to sustain the action against an agent employed by it to collect the same. *Per ALLEN, J.*

Accordingly, where the Bank of Wilmington was the owner of a bill of exchange payable at sight at Troy, and indorsed and transmitted it to the plaintiff under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and with the same redeemed the circulating notes of and paid drafts drawn by the Bank of Wilmington; and the plaintiff indorsed and transmitted the bill to the defendant, its correspondent in New-York, for collection, and the same was by the latter sent to the Troy City Bank for the same purpose; *Held* that the plaintiff could recover of the defendant the amount of the bill if collected by the Troy City Bank, or if the same was lost by the omission of the latter to charge the drawer and indorsers.

The bill was received by the Troy City Bank, on Friday morning the 19th of Nov., and was then presented to the drawee and delivered to him on receiving his check on that bank for an amount exceeding the bill, and the difference between the check and the bill was paid him. The drawee had not funds in the bank to the amount of the draft when it was delivered to him and his check received, but on the evening of the same day he made his account good to the amount of this and other checks drawn during the day, by cash and sight drafts on New-York. On the 20th he drew checks on the bank which were paid to a large amount, and made his account good in the evening by cash and drafts on New-York. These drafts were never paid, and amounted to more than the bill. On Monday the 22d, the Troy City Bank procured the bill from the drawee and demanded payment of the same, protested it for non-payment, and served notice of non-payment on the drawer and indorsers: *Held* that the defendant was liable for the amount of the bill: that if it was not paid there was an omission to charge the drawer and indorser.

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*Commercial Bank of Penn. against Union Bank of New-York.*

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**ASSUMPSIT** to recover the amount of a bill of exchange drawn at Wilmington, in the state of Delaware, by one Hutton on Thomas E. Warren of Troy, N. Y. for \$11,421.55, dated Nov. 15th, 1847, payable at sight to the order of Betts, Harlan and Hollingsworth, and indorsed by them.

The declaration in addition to the common money counts contained two special counts, in each of which it was averred that on the 17th of November 1847, the plaintiff was the holder of the bill of exchange, and on that day delivered it to the defendant for collection; and in the one it was further averred that the defendant, on the 19th of said November, collected the bill of the drawee and surrendered it to him, and thereby became liable to pay the amount to the plaintiff, concluding with the usual *super se* assumpsit, and refusal to pay on request; and in the other it was further averred that the defendant for a valuable consideration promised the plaintiff, that it would diligently present or cause to be presented to the drawee thereof said bill and procure the same to be accepted and paid by him, unless such acceptance and payment should be refused, and would give all necessary and proper notices to charge the drawer and indorsers in case the bill was dishonored, and alleging a breach of this promise and a neglect to charge the drawer and indorser. The defendant pleaded non assumpsit.

The cause was tried at the Rensselaer circuit in 1849, before Justice Harris. On the trial it appeared that the bill was, on the day of its date, delivered to the payees, who indorsed and delivered it the same day to the Bank of Wilmington and Brandywine, at Wilmington, by which its amount was credited to the payees in account as cash, and paid out upon their checks. On the same day the Bank of Wilmington and Brandywine, by its cashier, G. W. Sparks, indorsed the bill to the plaintiff, making the same payable to J. J. Cope, its cashier, and transmitted it to the plaintiff at Philadelphia, its place of business. By the plaintiff it was transmitted properly indorsed to the defendant at New-York for collection. The defendant indorsed the bill to S. K. Stow, cashier of the Troy City Bank at Troy, and forwarded the

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same by mail to that bank for the same purpose. The latter bank received it on the 19th day of November, and in the morning of that day presented it to the drawee, and surrendered it to him on receiving his check on that bank (the Troy City) for \$17,767, the bank paying to him the difference between the bill and the check. This check was charged by the bank to Warren, and he entered the bill in his books as paid and charged the amount to the payees, it having been drawn by his agent for the amount of a debt due from him to them, and placed it among his paid drafts. Warren had not at this time funds to the amount of this check in the bank, but after bank hours of that day he deposited \$28,348, of which \$11,000 were made up of two drafts drawn by him on Messrs. Houghton of New-York, payable at sight, which were never paid; and on the 20th of Nov. he deposited \$18,000, of which \$13,000 were sight drafts on the Houghtons and not paid. The check of \$17,767 was the first check of Warren's paid by the Troy City Bank on the 19th of November, and after the payment of this check they paid others drawn by him to the amount of \$10,377.00, and on the next day they paid his checks to the amount of \$17,649.75. The Houghton drafts are still held by the bank. Warren paid nothing after Saturday the 20th of November. He was a broker, and had been in the habit of drawing checks during the day on the Troy City Bank, which were paid by it without reference to the state of his account, and of making his account good by deposits in the evening of the same day.

On Monday the 22d of Nov. after the failure of Warren, the drawee of the bill, the cashier of the Troy City Bank called and procured from him the bill, and then demanded payment of it, and thereupon gave notice of dishonor to the drawer and several indorsers, and returned the bill with a certificate of protest, &c. to the defendant. The notices sent to the drawer and indorsers were dated Nov. 19th, and stated that the bill on the evening of that day had been protested for non-payment.

The Bank of Wilmington and Brandywine and the plaintiff are corresponding banks, each transmitting to the other com-

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mercial paper payable within certain territorial limits, to be collected. All notes and bills sent by the one to the other are indorsed and transferred so as to make the party receiving them the holder, with the absolute and control ability to dispose of them as it deems proper; and the avails of the paper transmitted by the Bank of Wilmington and Brandywine to the plaintiff for collection, constitute a fund in the hands of the latter for the redemption at Philadelphia of the bills of the former, and for the payment of drafts drawn from time to time on the plaintiff by the Bank of Wilmington and Brandywine; and the bill in question was transferred and transmitted to the plaintiff under this arrangement. It appeared that Sparks, the cashier of the Bank of Wilmington and Brandywine, received on the 24th of November the notice sent by the cashier of the Troy City Bank, stating that the bill was protested on the 19th for non-payment, and on the next day he received the bill per mail: that he then had no notice or knowledge of what had occurred between the Troy City Bank and Warren as to the bill, and supposing and believing that the bill had been regularly and duly presented for payment and payment refused, and that the drawer and indorsers had been duly charged, drew his pen through the indorsement which he made upon the bill when it was transferred and transmitted to the plaintiff; that subsequently and on the 29th of November, the Bank of Wilmington and Brandywine was notified by the payees of the draft that they did not consider themselves liable as indorsers of the bill—that the firm of Betts, Harlan & Hollingsworth, the payees and indorsers of the bill, were perfectly responsible.

Upon the trial the defendants objected to parts of the depositions of Cope and Sparks, for reasons which are stated in the opinion. The defendants, at the close of the evidence on the part of the plaintiff, moved for a nonsuit and renewed the motion at the close of the evidence in the cause, and insisted that the plaintiff was not entitled to recover for the following reasons: 1. That the plaintiff was not and is not the owner of the bill, and the cause of action being founded on negligence was not

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assignable ; and that if the bill had been paid and the action was for money had and received, it should have been brought in the name of the owner of the draft and of the party damnified. 2. That the action for negligence or for the money collected, could only be brought by the Bank of Wilmington and Brandywine against its immediate agent, the plaintiff ; that the defendant, a remote agent, could not be made liable to the agent of the holder. 3. That the defendants discharged their duty by transmitting the bill to the Troy City Bank for collection. 4. That the check of Warren, the drawee, was not payment of the bill and was not received as such by the Troy City Bank. 5. That the bill was duly protested for non-payment, the drawee having three days grace on a sight bill. 6. That the erasure of the names of Sparks and Cope and Ebbets, the respective cashiers through whose hands the bill had passed on its transmission for collection, canceled all the title and interest of the plaintiff to maintain this action.

The several objections were overruled by the justice, who decided that the plaintiff was entitled to recover the amount of the bill with interest ; to which opinion and decision the defendants excepted, and the jury under the direction of the court rendered a verdict in favor of the plaintiff, in accordance with said decision. A motion for a new trial was denied by the supreme court sitting in the third district, and from the judgment perfected in the action the defendant appealed to this court.

*Job Pierson*, for appellant.

*J. Austin Spencer*, for respondent.

W. F. ALLEN, J. In the progress of the trial the defendants' counsel moved to suppress the depositions of Sparks and Cope, witnesses on the part of the plaintiff, taken upon commissions, for several reasons assigned at the time, none of which, however, with a single exception, extended to the entire deposition of either witness. The objections therefore, with that exception, were properly overruled, although it should be con-



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ceded that some parts of the depositions were objectionable, and should have been excluded as evidence. The party made his objections too broad, and the court therefore properly disallowed them. With the exception referred to, the objections were to particular interrogatories and specific answers, and furnished no reason for suppressing the entire depositions; and, although, after taking out the objectionable answers, but little might remain which as evidence could affect the merits, it still would have been improper to exclude the whole because of objections to parts. The specific objections were to the 3d, 4th, 8th, 9th, 10th, 11th and 12th interrogatories annexed to the commission, and to the answers of the witnesses to the last and general interrogatory, leaving five interrogatories and their answers confessedly unobjectionable.

But the objections relied upon are not in my judgment tenable. The first is to several of the interrogatories, in which reference is made to a copy of a draft annexed and shown to the witnesses, who are inquired of as to their previous knowledge of the original, and of the transfer thereof. It was not an attempt to give secondary evidence of the bill, but a simple method of describing the paper and calling the attention of the witnesses to it, that they might testify understandingly and intelligently in relation to it, and the negotiations and dealings of the parties concerning it. Upon the examination of the witnesses the original was produced and identified by them; and a party is never called upon to risk the loss of valuable original papers by annexing them to a commission to be transmitted to a distant state or country for execution. The 11th interrogatory, as to the usual mode of transferring notes and bills from one bank to another, is not objectionable as calling for the answer of a witness to a question of law. The witnesses were asked as to the mode and manner, and the officer by whom indorsements on behalf of a bank were usually made; the legal effect of the indorsement was not touched by the question. By the 12th interrogatory the witnesses were not called upon to give parol evidence of a written instrument, or to determine the legal and

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proper mode of indorsing and collecting drafts, but were asked to state what the existing arrangements were for transacting that business between the two banks, of which they were respectively cashiers, and called for facts and not opinions.

It is not claimed that the general interrogatory is improper. The answers of the witnesses in this case to that interrogatory are pertinent to the matters in issue, and directly concern the merits of the action. If the defendants were surprised by the testimony, and desired to controvert or explain the facts stated, either by a further examination of the same witnesses, or otherwise, their course was to seek by a proper application to the court for an opportunity to do so. The remedy for the difficulty was not by a suppression of the whole evidence under the commission. If the answers were not pertinent in whole or in part, objections should have been taken to the parts not relevant. The objection pressed to the whole depositions was, that one of the attorneys for the plaintiff conversed with the witnesses prior to their examination, and at their request wrote down for them the substance of the facts in answer to the several interrogatories. It would have been better, doubtless, in view of the relation which the witnesses bore to the cause, that this had not been done; and had the facts to which they testified been the subject of a contest and contradictory evidence, it would have been proper subject of remark to the jury; but I see no reason for suppressing the depositions, especially in the absence of any suggestion that the witnesses have been imposed upon, or that any fact has been misstated, unduly colored or concealed. Whenever undue means are employed to give shape or color to evidence taken upon commission, it will be proper upon motion to set aside the deposition and order the commission to be executed anew, or deprive the party thus abusing the process of the court of its benefit, as shall be deemed most fit. But there is no reason to suppose that in this case the defendants would have taken any thing by a motion of that kind. There was then no error in the denial of the motion to suppress the depositions.

The questions upon the merits relate, 1. To the parties; and

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2dly, to the existence of any cause of action growing out of the attempt to collect the bill in question. That the proper parties are before the court appears to be well settled upon authority in this state. The liability of the defendants for the acts and omissions of the Troy City Bank and their officers and agents in and about the collection of the draft, is no longer an open question. It was definitely settled by the court for the correction of errors, in *Allen v. The Merchants' Bank of New-York*, (22 *Wend.* 215,) in which it was resolved "that when a bank, broker or other money dealer receives, upon a good consideration, a note or bill for collection in the place where such bank, broker or dealer carries on business or at a distant place, the party receiving the same for collection is liable for the neglect, omission or other misconduct of the bank or agent to whom the bill or note is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied;" and this doctrine was reasserted and directly approved by this court in *The Montgomery County Bank v. The Albany City Bank*, decided December, 1852, in this court. If a liability has been incurred by the defendants by reason of an omission of duty on the part of the bank at Troy, either in the payment of the money collected or in charging the prior parties to the bill upon its dishonor by the drawee, it is quite evident that such liability is to the plaintiff which alone can enforce it by action. To this effect is the decision of *The Montgomery County Bank v. The Albany City Bank*. It was there held that the plaintiff, who had transmitted a bill payable in New-York to the Albany City Bank, for collection, could not maintain an action against the Bank of the State of New-York, to which, as the correspondent and agent in New-York of the Albany City Bank, the latter had transmitted it for the same purpose, for an omission to charge the drawer and indorsers upon non-payment by the drawee, reversing the decision of the supreme court, holding the contrary doctrine. (8 *Barb.* 396.) Jewett, J. says, "And if

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it be necessary or convenient for such bank (the bank receiving a bill or note for collection,) to employ some other bank or individual to collect the bill at the place of its location, or at a distant place where the bill is payable, and it does employ such other bank or individual to whom it transmits the bill for that purpose, the latter on receiving the bill and entering upon the discharge of the trust, becomes the agent of the former bank and not of the owner, and in the absence of any agreement to the contrary is answerable to it for any neglect in the discharge of its duties as such agent, whereby the former bank sustains any loss or damage ;" and again, "The New-York State Bank was the agent directly guilty of the neglect. The bank was employed to do this service by the plaintiff's agent, the Albany City Bank, as its agent, to whom it was alone responsible for its acts and neglects, and the latter, according to the settled rule, was responsible to the plaintiff for its acts and omissions in the matter, there being no agreement to the contrary, express or implied." The doctrine put forth in the *Bank of Orleans v. Smith*, (3 *Hill*, 560,) that where a note payable at a distance is deposited with a bank for collection, and the latter transmit it to another bank for the same purpose, both are to be regarded as agents for the holder, is disapproved in the same opinion.

Indeed, it seems to follow necessarily from the adjudication in *Allen v. The Merchants' Bank*, that the defendant being the agent of the plaintiff is responsible to it as principal for the proper discharge of the duties of the agency. The contract of the agent respecting the business of the agency, which the law implies, is with his immediate principal, and where the relation of principal and agent is established as it is between the parties to this action by the authorities cited, the contract and consequent rights and liabilities result as necessary sequents, unless expressly provided against by agreement.

Again, if, as is claimed by the defendants, the plaintiff was not the holder of the bill of exchange, which is the subject of the controversy in this action, but was the mere agent of the holder,

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(the Bank of Wilmington and Brandywine,) still as such agent it had the custody of the bill and was charged with a duty in regard of it, which authorized it to employ others in the business of the agency, and it necessarily follows that it might by contract provide for the faithful performance of the duties of those whom it should employ, and that as upon any other legal contract an action will lie for a breach of its provisions. The contract being lawful and the duty being such an one as the plaintiff has undertaken to perform and may properly procure to be done by others, the defendant is estopped from denying the title of the plaintiff to the bill for all the purposes of this action. Quoad its own agent, lawfully employed in the collection of the bill, the plaintiff was the holder of the bill. Had the bill been unlawfully destroyed or taken from the possession of the plaintiff, the wrongdoer could not, in an action for the injury, object to the title of the plaintiff or that the owner had not compelled it to respond. The possession and right of possession, coupled with the liability to the owner, would give an interest in the bill itself, and authorize an action in the name of the bailee. So for the non-performance of a legal contract with the bailee, he may maintain an action and recover the legal damages resulting from such non-performance, without waiting until he shall have been compelled to respond to his principal. But in this case the plaintiff became by the arrangement with the Bank of Wilmington and Brandywine, under which it redeemed its circulating notes and honored and paid its drafts on the credit of its remittances for collection, by the transfer of the bill to it, the legal owners and holders thereof, and as such irrespective of any agency, entitled to all the rights of such owner and holder. This is in effect decided in *Clark v. The Merchants' Bank*, reported (2 Com. 380,) and decided upon a second appeal at the last term of this court. As agent under an obligation to collect the bill for the owner, the plaintiff was authorized to contract with another to perform that duty, and from the right to contract results the right to enforce the contract by action; and as the indorsee of the bill under the business arrangement existing within it, and

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its immediate indorser, the plaintiff, had the possession of the bill coupled with an interest which entitled it to make and enforce the contract with the defendants, which is the foundation of this action, or any other legal contract, either for the transfer or collection of the bill, so that in either capacity the action is properly brought by the plaintiff. Upon the other branch of the cause there is no difficulty.

The parties being the proper parties to the action the cause of action was clearly established. (1.) The bill was paid by the drawee to the Troy City Bank. By the receipt of the check of Warren, and charging it to him in account and surrendering to him the draft the same was paid and satisfied. (*Pratt v. Foote, decided in this court, March T. 1854.*) And if not paid by that transaction, after the account of the drawer of the check was made good as against the check by subsequent deposits, which the law applied to the first debit against the depositor, and which in this case was the check given in fact in payment of the bill in question, the draft was in no sense a valid or subsisting bill, but was paid and satisfied and could not be revived by any subsequent negotiation or dealings of the parties. (*Allen v. Culver, 3 Denio, 284; Webb v. Dickinson, 11 Wend. 62; Seymour v. Van Slyck, 8 Id. 403.*) Payment to the Troy Bank was payment to the defendant, and being shown established their liability to the plaintiff. (2d.) If the bill was not paid, then the drawer and indorsers were discharged by the omission of the agent of the defendant to give the proper notices of the dishonor of the bill by the drawee and take the proper measures to charge them.

If the drawee was not entitled to the usual days of grace upon a bill payable at sight, then it was the duty of the agent to demand payment, on the 19th of November, the bank having received it on the morning of that day, and on failure of the drawee to pay, to give the proper notices to the prior parties thereto. This, it is conceded, was not done. If grace is allowable upon sight drafts, which is not conceded, then it should have been presented for acceptance within a reasonable time,

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and in case of non-acceptance notice given to the proper parties. (*Story on Bills*, §§ 228, 342. *Walker v. Bank of the State of New-York, Court of Appeals, March T. 1854.*) The bill was not accepted and no notice of non-acceptance was given.

If it is claimed that the bill was accepted, or that no formal acceptance of a bill at sight was necessary, then the drawer and indorsers were discharged for two reasons. (1.) The demand on the morning of Monday, the 22d of November, was premature; the party being entitled to three full days (if days of grace are allowed upon sight drafts,) after the presentment of the draft on Friday, the 19th. (2.) The notices were of a dishonor by non-payment, on the 19th, and were not deposited in the post office until the 22d, too late to charge the parties upon a dishonor by non-payment on the 19th, and did not give any information of the refusal to pay on the 22d. But the breach of duty on the part of the Troy City Bank, and the consequent discharge of the drawer and indorsers, was not really controverted upon the argument, and therefore need not be more elaborately considered. The judgment of the court below was clearly right, and should be affirmed with costs.

GARDINER, Ch. J. delivered an opinion in favor of affirming the judgment, on the ground, that, without deciding whether the plaintiff as a mere collecting agent could recover, the plaintiff was on the facts of this case both the legal holder of the bill and interested in its proceeds when it transmitted the same to the defendant, and therefore entitled to sustain the action.

Judgment affirmed.

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*Christopher against Austin.*

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CHRISTOPHER, executor, *against* AUSTIN.

A wrongful eviction of the tenant by the landlord from a part of the demised premises suspends the rent until the possession is restored.

The landlord cannot recover, on the agreement to pay rent, a portion thereof, or any compensation for the part of the premises occupied by the tenant while such eviction continued.

Nor can he recover, in an action for use and occupation, the value of the part of the demised premises enjoyed by the tenant during the term, and while deprived of the residue by such eviction.

Therefore, where premises were demised by an agreement not under seal for a year, at the rent of two hundred dollars, payable quarterly, and the landlord, before any rent became payable, wrongfully entered and evicted the tenant from a part of the premises, but the latter voluntarily occupied the residue to the end of the term, when the landlord brought an action for use and occupation; *Held*, that he could not recover.

Where the tenant is evicted from a part of the premises by title paramount to the lessor's, the landlord may recover for the portion of the premises enjoyed by the tenant. *Per* PARKER, J.

APPEAL from a judgment of the New-York common pleas. The action was brought by Thomas Vermilya in that court to recover for the use and occupation of a dwelling house and three lots of ground from the 1st of May, 1847, to the 1st of May, 1848. The cause was tried before Judge Woodruff, without a jury. He found "that the defendant, by agreement not under seal, hired from the plaintiff the demised premises, from the 1st of May, 1847, to the 1st of May, 1848, at the rent of two hundred dollars, payable quarterly, and entered into the possession thereof under the agreement; that afterwards, and before any rent became payable, the plaintiff entered upon the demised premises and evicted the defendant from a part thereof, which eviction continued during the whole residue of the term; that notwithstanding such eviction, the defendant voluntarily continued to enjoy, use and occupy the residue of the premises until the expiration of the term on the first of May, 1848; that after the first of February, 1848, the plaintiff prosecuted the defendant in an action of



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assumpsit upon the agreement, to recover the three quarters' rent, due on that day; in such action the defendant interposed as a defense the eviction of him by the plaintiff from a part of the demised premises, and upon trial of this issue a verdict was rendered in favor of the defendant, upon which judgment was entered." The judge decided as matter of law upon said facts, that such wrongful eviction of the defendant from a part of the premises, suspended the rent, and that the plaintiff could not recover for the use and enjoyment of the residue of the premises while such eviction continued; and therefore, whether the record and judgment in the former action were or not a bar to a recovery for the use and occupation from May 1st, 1847, to February 1st, 1848, that the eviction having continued during the whole term, this action for a compensation for the use and occupation of the residue of the premises, could not be sustained; and directed judgment in favor of the defendant. On an appeal by the plaintiff, the court of common pleas, at general term, affirmed the judgment. The plaintiff appealed to this court.

During the pendency of the suit, Vermilya, the plaintiff, died, and the suit was continued in the name of Christopher, his executor.

*A. S. Garr*, for the appellant.

*M. G. Harrington*, for the respondent.

PARKER, J. The judge found the fact that after the leasing of the premises for one year, viz: from the first day of May, 1847, to the 1st of May, 1848, by a written lease, not under seal, at a rent of \$200, payable quarterly, and after the defendant had entered into possession under such agreement, before any rent had become payable, the plaintiff entered upon the premises and evicted the said tenant from a part thereof, which eviction continued during the whole residue of the term of the hiring.

It is contended by the plaintiff's counsel, that although such

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an eviction would be a bar to an action on the agreement to pay rent, yet that it is no bar to an action under the statute to recover a reasonable sum for the use and occupation, if the tenant continue to occupy a portion of the premises after such eviction from a part. There is no reason for such a distinction, nor can it be sustained by authority. The rule is, that if the landlord enter wrongfully upon or prevent the tenant from the enjoyment of a part of the demised premises, the whole rent is suspended till the possession is restored. (*The Fitchburg Corporation v. Melven*, 15 Mass. R. 268.) Nelson, Ch. J., said in *Lawrence v. French*, (25 Wend. 445,) "his (the landlord's) title is founded upon this, that the land leased is enjoyed by the tenant during the term: if therefore, he be deprived of it, the obligation to pay ceases." And Spencer, senator, in *Dyett v. Pendleton*, (8 Cowen, 731,) states as the reason for the rule, "as to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent." It would be a palpable evasion of the rule and of the penalty the law imposes upon the landlord for a wrongful eviction, to hold that he may recover for use and occupation on a *quantum meruit*, when he is not permitted to recover on the agreement itself.

The exception to the rule is where a part is recovered by title paramount to the lessor's; for in that case he is not so far considered in fault, as that it should deprive him of a return for the part remaining. (*Lawrence v. French*, 25 Wend. 445; 8 Bac. Abr. 514, tit. Rent, L.; *Gilbert on Rents*, 173.) And where the tenant enters, but is prevented from obtaining the whole of the premises, by a person holding a part under a *prior lease* executed by the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation on a *quantum meruit*. (*Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 ~~Tenn~~ R. 458; *Tomlinson v. Day*, 2 Brod. & Bing. 680.)

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merely said that  
Occupation is a head  
of covenant for quiet  
enjoyment.

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Christopher against Austin.

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I know the rule has been laid down in some of the elementary books, (*Story on Cont.* § 657 ; *Taylor Lan. & Ten.* 443,) to be that when the rent is entire and the landlord evicts the tenant during his term out of part of the premises, he may abandon the residue, and is not chargeable for the occupation of any part ; but that if the tenant still continue to occupy the residue, he is chargeable upon a *quantum meruit*. The rule has been thus stated on the authority of two *nisi prius* cases, viz: *Smith v. Raleigh*, (3 *Camp.* 513,) and *Stokes v. Cooper*, a case not reported but referred to in a note to the same case, as having been decided by Dallas, J., at the Worcester Lent Assizes. In *Smith v. Raleigh* it appeared the tenant abandoned the premises after being evicted from a part, but the decision was not put by Lord Ellenborough on that ground, and I think the tenant would equally have been entitled to judgment, if he had remained in possession of the residue. The only case that can be found favoring the idea that a tenant who remains in possession of the residue during the term, after an eviction from part, is chargeable, is that of *Stokes v. Cooper*, above cited. And that is not sufficiently reported to enable us to know what were the facts of the case ; and if it were so, it would be entitled only to the weight due to a hastily made decision at the circuit. If the decision was what it is claimed to have been, it is at war with the rule of law as it has been generally stated in well considered cases. The consequence of an eviction from part is not merely a discharge of the tenant from the rent, provided he abandons the residue, but it is a discharge of the tenant from any rent or liability for the occupation of the residue during the term of hiring. In *Dyett v. Pendleton*, (8 *Cowen*, 731,) Spencer, senator, said, "this distinction, which is as perfectly well settled as any to be found in the books, establishes the great principle that a tenant shall not be required to pay rent, *even for the part of the premises which he retains*, if he has been evicted from the other part by the landlord," and the rule as recognized in other cases and generally stated in the treatises is, that an eviction from part will operate as a suspension of the whole.

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*Lewis against Lewis.*

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(24 *Wend.* 445; *Comyn's Land & Ten.* 524; 2 *Saund. Pl. & Ev.* 680.)

I suppose it is the right of the tenant under such circumstances to remain in possession of the residue during the term, and that he can neither be made liable on the original lease nor in an action for use and occupation, unless he holds over after the expiration of his term.

If I am right in this conclusion, the wrongful eviction of the defendant was a bar to the plaintiff's right of recovery for the use of the premises in any form, and it is not necessary to consider whether, or to what extent, the litigation of the same subject matter or of three-fourths of it at least, in the former action, would have constituted a good defense.

There are no questions properly before us for examination, except those presented by the bill of exceptions. We cannot review the decision of the court below, on the motion to set aside the judgment, on the grounds of surprise and irregularity. These were matters of discretion, and did not involve the merits. I think the judgment of the court below should be affirmed.

GARDINER, Ch. J., also delivered an opinion in favor of affirmance.

Judgment affirmed.

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*LEWIS against LEWIS.*

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A party seeking to establish an instrument as a will, must prove that all the requirements of the statute were substantially complied with in its execution.

Mere want of recollection on the part of the subscribing witnesses as to the prescribed formalities, will not invalidate the instrument as a will, if it is established by other evidence that it was executed according to the statute. *Per ALLEN, J.*

But its due execution cannot be inferred or presumed from the fact that the attestation clause states that all the forms prescribed by the statute were complied with, where the contrary is proved. *Per ALLEN, J.*

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*Lewis against Lewis.*

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The acknowledgment by the testator of his subscription to the instrument, and his declaration that it is his will, are independent requisites to its proper execution, and it must be shown that each was complied with.

Where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names it was so folded that they could not see whether it was subscribed by him or not; and the only acknowledgment or declaration made by him to them or in their presence as to the instrument was, "I declare the within to be my will and deed;" *Held* that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute; and *held further*, that this language was not of itself a sufficient declaration that the instrument was his will.

**APPEAL** from the judgment of the supreme court of the second district.

In November, 1850, an instrument dated February 2d, 1849, was propounded to the surrogate of the county of Kings, as the last will and testament of Thomas Lewis. It purported to devise and bequeath all his real and personal estate to his wife, Clarissa C. Lewis. Joseph B. Lewis and others, the heirs of the deceased, opposed the probate.

The name of the deceased was signed to the alleged will in his proper handwriting; it purported to have been witnessed by two subscribing witnesses; attached to the will and above the signatures of the witnesses was an attestation clause as follows, "the above written instrument was subscribed by the said Thomas Lewis in our presence, and acknowledged by him to each of us, and he at the same time declared the above instrument so subscribed to be his last will and testament, and we at his request have signed our names as witnesses hereto."

Ferris Tripp, one of the subscribing witnesses, testified in substance that he was a clerk in the store of the deceased at the date of the will, and that Wing, the other subscribing witness, was also a clerk: that he, the witness, signed his name at the end of the attestation clause, at the request of the testator; that on the occasion when he did so Wing and he were called by the deceased into his private office, where he had a paper of which he turned up so much as would allow them to write their names, requesting them to sign the same and add their residences to

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*Lewis against Lewis.*

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their respective names ; that he also then said, "I declare the within to be my free will and deed." That this was all that was said, according to his recollection, and that he and Wing then signed their names to the instrument where the same appear : that he did not then know to a certainty what the instrument was, but thought it was a will from the fact that the deceased had that morning sent out and procured a blank will. On a cross-examination this witness testified that at the time he signed his name to the instrument it was so folded or placed upon the desk that he saw no part of the contents, and that neither the same or any part of it was read to him ; that he did not see the testator sign it, nor did he see his signature to it when he signed as a witness. W. B. Wing, the other subscribing witness, testified in substance, that he signed his name to the alleged will in the office of the deceased ; that he was unable to say what occurred on that occasion, but that according to his recollection he signed it at the request of the deceased ; that he had no recollection that the deceased said any thing else to him at the time he requested him to sign it, unless it was "to see him sign the document;" that he did not recollect that the deceased signed the instrument in his presence ; that he had no recollection that Tripp, the other witness, was present when he signed, and could not state any thing further which occurred or was said or done by the deceased on the occasion. On his cross-examination he further testified that according to his recollection he did not read, nor was any part of the instrument read to him when he signed it, and that he had no recollection that he then knew what the paper was.

The alleged will was a printed form, and it was proved that it was filled up in the handwriting of the deceased ; that it was either handed by him to his wife or placed in a drawer in his house not sealed up, accompanied by a letter written by him and addressed to her, dated February 2d, 1849, in which he stated that he had made his will giving her all his property, and advising her in reference to the estate.

The surrogate adjudged and decreed that the instrument was

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*Lewis against Lewis.*

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not executed and attested as a will in the manner prescribed by law. The widow appealed to the supreme court, which at general term affirmed the decree. (13 *Barb.* 17.) She appealed to this court.

*R. Emmet*, for the appellant.

*M. S. Bidwell*, for the respondent.

W. F. ALLEN, J. The legislature have made four things essential to the proper execution and attestation of a will, and a want of conformity to any of the requisites will invalidate the instrument as a testament. They are, 1. A subscription by the testator at the end of the will; 2. The making of such subscription in the presence of each of the attesting witnesses, or an acknowledgment of the making of the same to them; 3. A declaration by the testator, at the time of making or acknowledging the subscription, that the instrument so subscribed is his last will and testament; and 4. Two attesting witnesses who shall sign at the end of the will at the request of the testator. (2 *R. S.* 63, § 40.)

This statute is materially different from the former act upon the same subject, changing the law in some important particulars, and in others making that certain and positive which was before doubtful, or which rested solely on judicial interpretation. So also our statute differs essentially from the English statute of 1 Vic. ch. 26; the latter not requiring a publication of the will by the testator as a distinct act in the presence of the attesting witnesses. The adjudications of the courts of this state and of England are considered by the chancellor in *Brinckerhoof v. Remsen*, (8 *Paige*, 488,) and by the chief justice in the same case in error, (26 *Wend.* 325,) and the change which was wrought in the laws of this state by the revised statutes and the difference between the requirements of our own and the English statutes pointed out, which supersedes the necessity of a more particular reference to them at this time.

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Lewis against Lewis.

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The onus of showing a compliance with the statute devolves upon the party seeking to establish the will, but the formal execution and publication may be shown by persons other than the subscribing witnesses or inferred from circumstances as well as established by the direct and positive evidence of the attesting witnesses. It cannot however be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were done which are required to be done to make the instrument valid as a will. Mere want of recollection on the part of the witnesses will not invalidate the instrument, and in the cases cited by counsel the courts establishing the wills propounded have done so upon the ground that they were satisfied from the circumstances proved that the wills were duly executed, and that the witnesses had forgotten the facts; thus relieving the parties interested against the infirmities of humanity and the uncertainty of human recollection. Such are the cases of *Gove v. Garven*, (3 *Curteis*, 151;) *Gaze v. Gaze*, (*id.* 451;) *Blake v. Knight*, (*id.* 547;) *Cooper v. Bockett*, (*id.* 648.) See also *Brinckerhoof v. Remsen*, (*supra*;) *Nelson v. McGiffert*, (3 *Barb. Ch. R.* 158.) It is sufficient also if the compliance with the statute be substantial although not literal; the law looking to the substance of the transaction, and requiring only evidence that all the safeguards against improvidence and fraud, prescribed by statute, have been substantially observed, and disregarding the order of events taking place at the same time as parts of one transaction, and the particular words employed by the actors. (*In re Warden*, 2 *Curteis*, 334; *In re Thompson*, 4 *Thornton's Notes*, 643.)

It is objected against the instrument propounded as a will in this case, 1. That the subscription was not made or acknowledged by the decedent, in the presence of the attesting witnesses; and 2. That it was not declared by him at the time to be his last will and testament. The surrogate, with all the benefits of a personal examination of the witnesses, became satisfied that the instrument was not subscribed in their presence, and that the subscription was not acknowledged to them



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*Lewis against Lewis.*

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by the alleged testator, as required by statute; and unless the evidence is quite clear and satisfactory to the contrary, we ought not to disturb his adjudication upon this question of fact. One of the witnesses professes to relate all that transpired upon the occasion of the execution of the paper, and the other has no recollection of the circumstances, except that he was called in and signed his name to the instrument at the request of Lewis, the deceased. He was present with the first named witness and signed the paper upon the same occasion, but states no circumstance tending to discredit the testimony of his co-witness or to raise a presumption that he does not state fully all that took place at that time.

The evidence warrants the conclusion that the instrument was not subscribed by the decedent in the presence of the witnesses; that the paper was so folded that the witnesses did not see the subscription, and that the only declaration or acknowledgment of the party was in substance, "I declare the within to be my free will and deed." Could that aid the parties claiming under the paper as testamentary, it might probably be inferred that the deceased at the time of requesting the witnesses to subscribe as such, had himself signed the instrument and intended to comply with the statute and make a valid will. But that is not sufficient. The formalities prescribed by statute must be observed, and the attesting witnesses must be informed at the time and by the testator, or in his presence and with his assent, and have a knowledge of all the facts necessary to a due execution and publication of the will, and to which they are called to attest. If the party does not subscribe in their presence, then the signature must be shown to them and identified and recognized by the party, and in some apt and proper manner acknowledged by him as his signature. The statute is explicit, and will not be satisfied with any thing short of a substantial compliance with its terms.

In *Chaffee v. The Baptist Missionary Society*, (10 Paige 85,) the testatrix, who had subscribed the will by making her mark, but not in the presence of the attesting witnesses, after-

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Lewis against Lewis.

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wards, and in their presence, placed her finger on her name and said, "I acknowledge this to be my last will and testament." It was held that the will was not duly executed, and I think the decision right. The statute contemplates the subscription or the acknowledgment thereof in the presence of the witnesses, and a publication of the instrument as a will, as two distinct acts, and both are necessary to its due execution; and being explicit and clear in terms, courts are not authorized to vary it by construction or to make the one act stand for both. Upon this branch of the statute it is the subscription, not the will, which is to be acknowledged. *Holt v. George*, (8 *Curteis*, 160; *S. C.* 4 *Moore*, *Privy Council Cases*, 266,) was in circumstances very like this case. The deceased requested two persons to "sign a paper for him," which they did in his presence. The paper was so folded that they did not see any writing whatever on it, and no explanation of the nature of the instrument was made to them. It was held by the prerogative court and by the privy council in affirmance of the decree of that court, that there was no acknowledgment, express or implied, of the signature in the presence of the witnesses. A signature neither seen, identified or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name, to which the signature may or may not be at the time subscribed. The will was not subscribed in the presence of the witnesses, neither was the subscription acknowledged by the testator, and the execution was in this respect defective.

The second objection to the probate is also well taken. To satisfy the statute the testator must in some manner communicate to the attesting witnesses at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his will and intends to give it effect as such. It must be declared to be his last will and testament by some assertion or some clear assent in words or signs, and the declaration must be unequivocal. (*Brinkerhoof v. Remsen*, *supra*; *Ruther-*

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*Lewis against Lewis.*

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*ford v. Rutherford*, 1 *Denio*, 33.) The policy and object of the statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and at the time of its execution, which includes publication, designs to give effect to it as his will, and to this, among other things, they are required by statute to attest. Every fact is important in view of the position of the attesting witnesses. They should be satisfied that the instrument is in truth the last will and testament of the party, and is executed and published as such, and that he is of sound and disposing mind and memory, and in all respects competent to perform the act. The law simply prescribes those forms which it was supposed were best calculated to enable the witnesses to fulfil their office and attest the due execution of the will. The declaration that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose the instrument was a deed. It is a very common form of acknowledgment of the execution of a deed to acknowledge it as the "free act and deed" of the party, and the expression of the decedent varied but little from this form.

It is not probable that any wrong would be done in this case to the parties or to the intentions of the deceased to give effect to this document as a will, and although we may regret that the provisions which he designed to make for his family, and doubtless supposed he had made, must fail for the want of the pre-

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Cropsey *against* Ogden.

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scribed formalities, the statute is quite too explicit to authorize a departure from its terms; and although it may operate with apparent harshness in this case, it is a beneficent and wise statute, and the public interests will be best subserved by a strict adherence to its provisions.

The judgment of the supreme court affirming the decree of the surrogate must be affirmed with costs.

Judgment affirmed.

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CROPSEY and wife *against* OGDEN and others.

The act of 1818, concerning divorces, (2 R. L. 197, § 4,) prohibited a person whose marriage was dissolved, pursuant to its provisions, on account of his or her adultery, from marrying again during the life of the other party to the dissolved marriage.

Such person was not competent during the lifetime of the former husband or wife, and while said act was in force, to make a valid contract of marriage within this state.

The revised statutes (2 R. S. 139, § 5,) prohibit a person from contracting a valid marriage during the lifetime of any former husband or wife, where the former marriage was dissolved on account of the adultery of such person.

To bring a person within this prohibition it is not requisite that the former marriage should have been contracted after the revised statutes took effect.

Nor that the relation of husband and wife should have existed by virtue of the former marriage since that time.

Therefore, where a marriage contracted in this state, was in the year 1822 dissolved by the decree of the court of chancery on account of adultery by the husband, and afterwards in 1825, and again subsequent to the first of January, 1830, during the lifetime of his former wife, a marriage was solemnized in due form within this state between him and the plaintiff, with whom he cohabited as his wife till his death in 1847; *Held*, that each of these marriages with the plaintiff was void, and that she was not entitled to dower in the lands of which he died seised.

EJECTMENT, commenced in May, 1848, by Eliza Ann Ridgway, to recover the undivided third of premises situate in the

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*Cropsey against Ogden.*

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city of New-York, as her dower as widow of James Ridgway, deceased. The cause was tried in the superior court, before Chief Justice Oakley and a jury. On the trial, the plaintiff proved that in the summer of 1825, the marriage ceremony was solemnized in the city of New-York, in due form of law, between her and James Ridgway; and that they continually resided and cohabited together as husband and wife, at said city, from the time of the marriage until his death in 1847; that at the time of his death he was seised in fee of the premises in question.

The defendants then proved that said James Ridgway was duly married to Catharine Dobb, in July, 1812, at the city of New-York, both of them then being inhabitants of the state of New-York, and that they cohabited and resided together as husband and wife in that city, until the autumn of 1815; that in 1822, upon a bill theretofore filed by her against him, in the court of chancery of this state, the marriage between them was by the decree of that court dissolved, upon the ground that he had been guilty of adultery. The decree recited that it was made pursuant to the act, entitled "an act concerning divorces, and for other purposes," passed 13th of April, 1818, and declared that the said marriage was dissolved, and each of the parties freed from the obligations thereof.

The plaintiff, in reply, proved that said Catharine and James Ridgway separated in 1815, and never afterwards cohabited together; and also gave evidence tending to prove that he and the plaintiff, Eliza Ann, were again married after the first day of January, 1830.

The court ruled and decided, and instructed the jury that James Ridgway was at all times, subsequently to the decree of divorce, incompetent to contract matrimony with the plaintiff; that such incompetency existed after the 31st day of December, 1829, the same as previously, and that the defendants were absolutely entitled to a verdict. To which decision and instruction, and each of them, the counsel for the plaintiff excepted. Pursuant to said direction, a verdict was rendered in favor of the defendants. A motion for a new trial was denied by the supe-

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*Cropsey against Ogden.*

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rior court, and judgment perfected in favor of the defendants. After such judgment, the plaintiff intermarried with Jasper Cropsey. They appealed to this court.

*George Wood*, for the appellants.

*M. S. Bidwell*, for the respondents.

JOHNSON, J. As early as 1787, (1 *Gr. Laws of New-York*, 428,) the legislature of this state provided for divorces upon the ground of adultery to be granted by the court of chancery. The chancellor is authorized, by sentence or decree, to pronounce the marriage between the parties to be dissolved, and both of them freed from the obligations of the same. By the 3d section of the same act it was provided, "That after the dissolution of any marriage has been pronounced by virtue of this act, it shall not be lawful for the party convicted of adultery to remarry any person whatsoever; and that every such remarriage shall be null and void; but that the other party may make and complete another marriage in like manner as if the party convicted was actually dead, any law, usage or custom, to the contrary thereof in any wise, notwithstanding."

In 1813, as a part of the general revision of the statutes which then took place, an act was passed concerning divorces, and for other purposes, (2 *R. L.* 197,) by the 4th section of which it was provided, that upon the ascertainment of the defendant's adultery by the court of chancery, "it shall be lawful for the said court to decree that the marriage between the parties shall be dissolved, and each party freed from the obligations thereof. And it shall be lawful for the complainant after such dissolution of the marriage, to marry again as though the defendant was actually dead. But it shall not be lawful for the defendant, who may be so convicted of adultery, to marry again until the complainant shall be actually dead."

The revised statutes contain two provisions relating to this subject. Part two, chapter 8, title 1, section 5, (2 *R. S.* 139,)

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provides as follows, "no second, or other subsequent marriage, shall be contracted by any person during the lifetime of any former husband or wife of such person, unless, 1. The marriage with such former husband or wife, shall have been annulled or dissolved, for some cause other than the adultery of such person; or, 2. Unless such former husband or wife shall have been finally sentenced to imprisonment for life. Every marriage contracted in violation of the provisions of this section shall be absolutely void," except in a single case not relating to the question in this cause. Section 49 of the same title, (2 *R. S.* 146,) provides, "whenever a marriage shall be dissolved pursuant to the provisions of this article, [of divorces dissolving the marriage contract,] the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again, until the death of the complainant."

The second part of the revised statutes took effect as law on the first day of January, 1830. (2 *R. S.* 778, § 8.) The general repealing act passed December 10, 1828, (3 *R. S.* 129, § 1,) enacted, that "From and after the 31st day of December, in the year 1829, the following acts and parts of acts, heretofore passed by the legislature of this state, shall be repealed," and specified among others the "act concerning divorces, and for other purposes," passed April 13, 1813.

It is not denied, and is at any rate clear, that up to the time of the repeal of the act of 1813, concerning divorces, the provision of the 4th section of that act, which says, "it shall not be lawful for the defendant, who may be so convicted of adultery, to marry again until the complainant shall be actually dead," applied to James Ridgway, so that he was not capable of contracting a valid marriage within this state, at any time prior to that period, and subsequent to his marriage with Catharine Dobb. The disability to marry, declared by this section, as well as by the 3d section of the act of 1787, above referred to, applied only to parties proceeded against and divorced as adulterers, under the provisions of those acts respectively. Under neither of those acts was an incapacity to marry imposed upon any per-

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son against whom a decree of divorce was not pronounced in our court of chancery; nor was there any other statute law of this state creating an incapacity to marry, except the "act to restrain all persons from marrying until their former wives and former husbands be dead," passed 7th February, 1788, which enacted, "that if any person or persons being married, or who hereafter shall marry, do at any time marry any person or persons, the former husband or wife being alive, then every such offense shall be felony;" but out of the operation of this act was expressly excepted, among other cases, "any person or persons who are, or shall be, at the time of such marriage, divorced by the sentence or decree of any court having cognizance thereof." This act also was repealed by the general repealing act before referred to, but remained in force until that repeal took effect. As to all persons, therefore, whose marriages came within the exception above stated, and to whom the disabilities created by the acts of 1787 and 1813 did not apply, marriage prior to January 1, 1830, was no violation of any statute of this state, and its validity depended upon common law principles only.

Following the pattern of these acts of 1787 and 1813, the 49th section of the revised statutes, (*supra*), was made applicable to marriages dissolved pursuant to the provisions of the article in which that section is contained. It has, therefore, no application to the case of Ridgway, against whom a divorce was granted under the act of 1813.

In further considering this case, I shall concede, without, however, meaning to express an opinion upon the question, that the saving words in the general repealing act are not broad enough in their terms to continue in existence, by force of the act of 1813, the disability to marry which Ridgway incurred upon the decree of divorce under that act for his adultery. Nor shall I assume that any part of the obligation of his first marriage remained after the decree of divorce; on the contrary, I consider all the obligations of that marriage extinguished by the decree of divorce. Assuming, for the purpose of giving full effect to the plaintiff's proofs, that after January 1, 1830, a marriage



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ceremony was celebrated between Ridgway and the plaintiff below, within this state. I shall consider the question of its validity under section 5, (2 *R. S.* 139,) before referred to.

Marriage, although a natural institution, is subject to the positive regulations of the state, which has power to determine the conditions upon which, and under which it may be contracted, or shall be forbidden. For instance, the revised statutes, (2 *R. S.* p. 138, § 2,) fixed 17 for males and 14 for females, as the ages at which they could contract marriage, whereas, up to that time, 14 for males and 12 for females, had been the ages of contract. This section was very soon repealed, but it was never doubted that the legislature possessed the power to enact it, nor was it ever supposed, that boys who were over 14 and under 17 at the time when it was passed, could upon that ground claim not to be included in its purview. So, if the legislature should now enact that no person under 25, or over 60, may hereafter contract marriage in this state, it would be absurd to pretend that persons who had reached the present lawful age to marry, but were not 25, or those now over 60, were exempt from the operation of the law. Of exactly the same character is section 5. Its object is to fix certain personal conditions in which marriage may not be contracted. It speaks from the time when it took effect as to all marriages thereafter to be contracted, and makes them unlawful and void if the state of either party to the marriage, at the time of its celebration, came within its prohibitions. Its prohibitory language is, "no second, or other subsequent marriage, shall be contracted by any person during the lifetime of any former husband or wife of such person." What facts, then, are necessary to bring a party within this prohibition? In the first place, there must have been a prior marriage. It is not necessary that the prior marriage should have taken place in this state, or after the statute took effect. A marriage at any time and any where, answers the requirement of the statute. In the next place, both parties to such prior marriage must be living. That is the plain requirement of the language, "during the lifetime of any former husband or wife,"

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and it requires nothing more. It does not import that the relation still continues, or on the other hand that it has ceased : upon that point it is silent ; but limits the inquiry to the dry fact, whether the person with whom the prior marriage was contracted still lives, at the time of the subsequent marriage. The plaintiff's counsel asks us to read it, "during the lifetime of any *husband or wife* to whom the party was formerly married." The objection to the proposed reading is a plain one. The expression reads well as it stands, and conveys a readily apprehended meaning, which may be very much altered if we should yield to the request. So read, it would or might import, that the relation of husband and wife must still continue between the former husband and wife at the time of the subsequent marriage. If that is the correct reading of the phrase, then the first exception is entirely unnecessary ; for parties once married, but whose marriage has been dissolved, can in no legal sense be said to be husband and wife. Nor, on the other hand, is the expression, former husband or wife, to be construed as implying that the relation no longer subsists ; for, in that case, the exception introduced by the 6th section would be rendered inapplicable. That section relates to the case of a husband or wife absenting himself or herself for five successive years, and not known by the other party to be living within that period, and of course involves the continuance of the relation. These considerations show that the word, former, as used in the section in question, imports merely, that the relation of husband and wife once existed, but neither affirms its continuance or denies its termination.

The prohibition then relates to the case of either party to a marriage, whenever and wherever contracted, both the parties to which are living, and prohibits either party to contract a second or other subsequent marriage during the lifetime of the other, except in certain cases specified. It ought also to be noticed, that while the several prohibitions to marry contained in the acts authorizing the court of chancery to grant divorces for adultery, operate only upon those against whom divorces are granted under those several acts, the section we are now con-

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*Cropsey against Ogden.*

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sidering has a much broader operation. Its subject matter is the prohibition of marriages within this state, to certain persons who come within its terms. It covers the case of one married abroad and divorced abroad for his own adultery, just as plainly as it does the case of a marriage and divorce for the same cause here. If I have put the proper construction upon the language of the statute, it is quite plain that it covers the case of James Ridgway, at any instant during his life after the statute took effect. When he may have undertaken to marry the plaintiff, Eliza Ann, if the inquiry had arisen whether his case was within the prohibition of section 5, it must have been answered that Catharine Dobb was his former wife and was alive, and those are the only facts upon which the prohibition is founded.

The next question, and the only remaining one is, whether the first exception covers Ridgway's case. It excepts out of the prohibition to marry the case of a person whose marriage with the former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person. This does not reach Ridgway's case. His former marriage was dissolved on account of his adultery, and his case is therefore not within the exception. The absolute prohibition of the statute applied to him, and the court below ruled correctly, that at no time after his marriage with Catharine Dobb, was he under our marriage laws capable of contracting a marriage.

Though it is not material to the decision of this question in this cause, it is not wholly inappropriate to say further, that the operation of this statute is not harsh or unreasonable in its application to persons in Ridgway's condition. He was, until the instant when this statute took effect, incapable to marry by the provisions of the former law; that prescribed no limit to his incapacity during the life of his former wife. This statute continues the same state of incapacity, and imposes it upon all others against whom divorces are granted on the ground of their adultery. There has been no moment of time since he was divorced when marriage was lawful to him in this state, nor has

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*Cropsey against Ogden.*

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the policy of the law, as evinced by the statutes, at any moment since his divorce, been changed.

The incapacity of an adulterer divorced on that ground by our own courts, to marry again in this state during the life of the injured party, was grounded upon the views entertained by our legislature in respect to the marriage relation. They considered such a person unfit again to assume obligations which he had once disregarded. The extension of the same rule to persons divorced abroad, is based on just reason and dictated by the same views of policy out of which the original rule arose. Regarding guiltiness of adultery as complete proof that the adulterous party was not fit to contract a new marriage, they determined to apply one rule to all persons so situated—to embrace all those within the prohibition of the law, to whom the reason applied upon which the prohibition was grounded. No question of comity between states is presented, for by the universal practice of civilized nations, the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated. Nor can any one justly complain that a uniform rule is applied to all persons, whether strangers or citizens, in respect to marriages to be contracted within the state.

It is not necessary for us to consider what would have been the effect of a marriage celebrated out of this state. No such question was presented in the case.

The judgment of the superior court should be affirmed.

GARDINER, Ch. J., DENIO, PARKER and ALLEN, Js. concurred.

EDWARDS, J., was in favor of reversing the judgment.

RUGGLES, J., was absent, and SELDEN, J., took no part in the decision.

Judgment affirmed.

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*Bate against Graham.*

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**BATE *against* GRAHAM, administrator, and JORDAN.**

It is the right and duty of an executor or administrator of a deceased debtor, whose estate is insolvent, to impeach a sale of personal property made by the deceased with intent to defraud creditors, and recover the same from the fraudulent vendee. *Per* DENIO, J.

Ordinarily, a creditor of the estate cannot maintain an action against such fraudulent vendee alone, or against him and the executor or administrator, to set aside the fraudulent transfer, and have the property held under it administered as assets to pay debts. *Per* DENIO, J.

But if the executor or administrator collude with the fraudulent vendee, or after reasonable request refuse to take proceedings to impeach his title and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator, for that purpose.

Therefore, where a debtor in his lifetime assigned a chose in action with intent to defraud creditors, and, his estate being insolvent, the administrator *denied that the assignment was fraudulent and insisted that it ought not to be set aside; Held*, that a creditor could maintain an action against the assignee and administrator to have the assignment declared void as to creditors, and the chose in action administered as assets to pay debts.

And where the complaint omitted to aver the fact, that the administrator claimed that the assignment was valid, but this fact appeared from his answer, and objection to the complaint on account of this omission was first taken at the trial, when it was overruled and judgment rendered in favor of plaintiff, and defendants appealed to this court; *Held*, that this court would deem the defect in the complaint supplied by amendment, and sustain the judgment.

THE action was commenced in 1851 by Bate, a judgment creditor of one Whorry, deceased, against Graham, the administrator of his estate, and Jordan, to set aside an assignment made by Whorry in his lifetime, to Jordan, of a verdict in his favor, against one Miller, on the ground that the assignment was fraudulent, and void as against creditors.

The complaint alleged that the plaintiff was the owner of a number of judgments, which were specified, recovered against Whorry in his lifetime, upon one of which an execution was returned unsatisfied shortly previous to the death of Whorry; that in October, 1850, Whorry recovered in an action on contract

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*Bate against Graham.*

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against one Miller, a verdict for \$1400, and soon after, and before judgment thereon, assigned the same to the defendant, Jordan; that such transfer was without consideration, and made to defraud the creditors of Whorry. That in November following, Whorry died, and the defendant Graham was appointed administrator of his estate. It further alleged, that all the real estate owned by the deceased had been sold to satisfy mortgages thereon, and that the personal estate which had come to the hands of the administrator, was of trifling value and wholly insufficient to pay the plaintiff's judgments. The complaint prayed that the transfer of the verdict to Jordan be canceled and set aside. Jordan, by his answer, denied that the assignment of the verdict to him was made without consideration, or to defraud creditors, and put in issue most of the other allegations of the complaint, by denying knowledge or information thereof. Graham, the administrator, by his answer, admitted all the allegations of the complaint, except that the verdict was assigned to Jordan to defraud creditors; this he denied, *and also denied that it was assigned with any fraudulent intent whatever, and insisted that the assignment ought not to be set aside.*

The cause was tried at the Orange county circuit, before Justice Brown, without a jury. At the trial, and before any evidence was given, the counsel for Jordan moved the court that judgment be rendered in his favor, on the grounds, among others, that the plaintiff had no right to maintain the action, but that it should have been prosecuted in the name of the administrator of Whorry; that the complaint showed no fraud or neglect of duty on the part of the administrator, or any fact giving the plaintiff a right to maintain the action, and that it was not averred in the complaint that without the verdict against Miller, the estate of Whorry was insolvent.

The court denied the motion, and the counsel for Jordan excepted. Evidence was given on the issues made by the pleadings. At the close of the evidence the counsel for Jordan renewed the objections to plaintiff's maintaining the action, taken at the commencement of the trial; said justice overruled

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*Bate against Graham.*

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the same, and the counsel for Jordan excepted. Said justice having found and decided that the assignment to Jordan was fraudulent and void as against the creditors of Whorry, ruled and decided that the plaintiff was entitled to maintain the action against Jordan, and that Graham as administrator was a proper and necessary party thereto, and ordered the assignment of the verdict to be declared void as between Jordan and the creditors of Whorry, and that the proceeds of the same be applied by Graham as administrator, to the payment of the debts of the deceased. To each of these rulings and decisions the counsel for Jordan excepted. Judgment was entered pursuant to this decision, and affirmed by the supreme court sitting in the 2d district at general term. The defendant Jordan appealed to this court.

*T. R. & C. R. Westbrook*, for appellant.

*T. McKissock*, for respondent.

DENIO, J., delivered the opinion of the court.

I am of opinion that a creditor of a deceased person, whether by judgment or simple contract, cannot, there being an executor or administrator appointed, maintain an action against a party in possession of, or claiming title to the assets of the debtor, to try the right to such assets. We have not been referred to any precedent for such an action, and I have been unable to find one. The executor or administrator is the party designated by the law to vindicate all such rights; and it would be incongruous to allow the creditor to pass him by, and bring an action directly against a party whom he conceives to be accountable to the executor. The court of chancery, however, had, and the supreme court now has plenary jurisdiction over executors and administrators, and can, concurrently with a court of law, and with the surrogate in certain cases, take cognizance of the administration of personal assets, of debts, legacies and distributions, and of the conduct of executors and administrators. (3 *Bl. Com.* 437; 1 *Story's Com. on Eq.* § 453; *Elmendorf v. Lansing*, 4 *John.*

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Bate *against* Graham.

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Ch. R. 562.) As an incident to this jurisdiction, the creditor may make a debtor of the deceased, or other party against whom the executor has a claim, a party defendant, where the executor is insolvent, or is acting in collusion with the debtor, and in some other special cases. The general rule, however, is, that a debtor of the estate cannot be made a party to the bill against the executor, as it would be taking the business out of the hands of the latter, and would lead to confusion in the administration of the estate. (*Bowsher v. Watkins*, 1 *Russ. & Myl.* 277; *Gedge v. Traill*, *id. note*; *Utterson v. Mair*, 2 *Ves. jr.* 95; *Long v. Majestre*, 1 *John. Ch. R.* 305.) Upon the statements of the complaint in this cause, the defendant Jordan is not strictly a debtor to the estate, but he occupies the position of a party who has fraudulently got possession of assets which he claims a right to appropriate to his own use. It was the duty of the defendant Graham to contest his title to those assets, and to take such proceedings as might be necessary to establish his right to them as administrator; and in the absence of any allegation to the contrary, it is to be presumed that he was ready and willing to do his duty. The rule which formerly prevailed, that the personal representatives of a deceased person could not impeach a transfer made by such person in his lifetime, on the ground that it was made with intent to defraud creditors, has been abolished by statute; and the defendant Graham had therefore the same right to question the assignment, of the judgment which he would have had if it had been obtained by any other species of fraud or by duress, or in any other unlawful manner. (2 *R. S.* 469, § 17; *Babcock v. Booth*, 2 *Hill*, 185.) One material question in this case, therefore, is, whether the complaint contains any sufficient allegations to justify the making of Jordan a party defendant. I think there is a sufficient statement that there were no other assets from which the plaintiff's debt can be paid than the claim transferred to Jordan. It is shown that an execution against the intestate had been returned unsatisfied, that his real estate had all been sold on mortgages, and that he was insolvent at the time of his death.



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*Bate against Graham.*

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and that only a small amount of personal property, not sufficient to pay the plaintiff's demand, had come to the hands of the administrators. It is not, however, alleged that the administrator is insolvent, or that he recognizes the title of Jordan, or is acting in any respect in collusion with him, or that he had been requested to challenge the assignment; nor is there any allegation showing the necessity of an injunction against Jordan, or that he had threatened to dispose of the demand assigned to him, or was himself irresponsible. If the complaint had been demurred to by Jordan for not stating facts sufficient to constitute a cause of action, I do not see how it could have been sustained.

*Hagan v. Walker*, in the supreme court of the United States, (14 How. R. 29,) has carried the right to join a fraudulent grantee of the deceased, as a defendant in a bill against the administrators, further than any prior case. There the alleged fraudulent grantee demurred to the bill, and although there was the same want of averments of insolvency and collusion on the part of the administrator which exists here, yet the complaint was sustained. The decision was placed in part upon the ground that there had been a delay on the part of the administrator of about two years, in taking proceedings to contest the title of the fraudulent grantee, and that it was doubtful whether the administrator could, without the concurrence of a creditor, disaffirm the conveyance of the intestate. These features do not exist in the case under review. But these were not the only or the principal grounds upon which the court placed its judgment. The opinion relies upon the circumstance that the administrator had likewise demurred to the bill, and had relied to support it on the statute of limitations; but the bill is sustained, "chiefly, because, (as the opinion states,) there is no danger of interfering with the due course of administration, or taking from administrators their proper control over suits for the recovery of assets, by holding that a creditor may file a bill against the administrator and the fraudulent grantee of the deceased debtor, to subject the property fraudulently conveyed to

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*Bate against Graham.*

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the payment of the debt." Regarding the expressions which I have last quoted, as unsupported by the prior authorities, and not consistent with the rule as long since settled and constantly recognized, I should hesitate to act upon it in this case. But there is another circumstance here which will, I think, enable us to sustain this judgment. Graham, the administrator, in his answer denies that the assignment to Jordan was executed with any fraudulent intent whatever. Had the complaint suggested that he maintained such views, it would have been beyond all just exception. It is the main point in which I have supposed it to be defective. I am of opinion that it may now be supplied by amendment. By the one hundred and seventy-third section of the code, the court may, before or after judgment, in furtherance of justice, allow an amendment, "by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." When, therefore, the defendant Jordan, at the commencement of the trial, took the objection under consideration, the court having before it the record, which showed that the administrator as well as Jordan was endeavoring to uphold the alleged fraudulent assignment, the court should, I think, have permitted or ordered an amendment of the complaint, to the effect that the administrator refused to regard the assignment as fraudulent, but concurred with the other defendant in seeking to uphold it. It has been shown that the supreme court of the United States, in the case referred to, took into consideration the mode of defense pursued by the administrator, even where the question arose upon a demurrer interposed by the alleged fraudulent grantee. This case is much stronger; for here the grantee submitted to answer the complaint, reserving the objection until the trial, and when the trial took place the record demonstrated that both defendants were relying upon the absence of fraud, and that both maintained the legal validity of the assignment.

I am, therefore, of opinion, that the judgment of the supreme court should be affirmed.

Judgment affirmed.

ROBERTSON and others *against* BULLIONS and others.

This court cannot review those parts of a decree of the supreme court not appealed from.

A religious corporation created under the general act consists not of the trustees alone, but of the members of the society.

The society is incorporated and its members are the corporators.

The relation of the trustees to the society is not that of a private trustee to the *cestui que trust*.

They are trustees only in the same sense in which the directors of a civil corporation are such.

They are the managing officers of the corporation, invested as to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations.

Religious societies incorporated under the act, are not ecclesiastical corporations in the sense of the English law.

They are to be regarded as civil corporations, governed by the ordinary rules of the common law.

A court of equity has not power to remove the trustees elected pursuant to the statute.

Nor has it power to require qualifications in the electors of trustees, other than those prescribed by the statute.

The trustees cannot take a trust for the sole benefit of members of the church as distinguished from other members of the society, or for the use of a portion of the corporators, to the exclusion of others.

They cannot receive a trust limited to the support of a particular faith or a particular class of doctrines. *Per* SELDEN, J.

Where in a conveyance in trust for religious purposes the use is expressed in general terms, it cannot be inferred from the religious faith of the grantor that it was intended to limit the use to the support of the particular doctrines in which he believed.

Where the language creating the trust is ambiguous, evidence of the faith of the donor, like that of surrounding circumstances, may be received to aid in the construction.

In 1785 a religious society was formed in the town of Cambridge, Washington county, under the name of the Associate Congregation of Cambridge. This society, upon its organization, connected itself with and became subordinate to the Presbytery of Pennsylvania. In July, 1786, Jonathan French, by

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*Robertson against Bullions.*

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deed expressing a consideration, conveyed one half acre of land to John Blair and six others, describing them as persons "chosen and elected trustees for the Associate Congregation of Cambridge, adhering to the Associate Presbytery of Pennsylvania." *Habendum*, to them "and their successors forever, for the sole and only proper use, benefit and behoof of the said Associate Congregation of Cambridge." This deed was not signed by the wife of French. In 1802, the Presbytery of Pennsylvania was divided into several presbyteries, this congregation being in the Presbytery of Cambridge, and a synod was established as the head of the church, styled the Associate Synod of North America. In January, 1810, French and wife, by the consent of the grantees in the first deed, executed another deed of the same half acre, to James Small, James Eddy and James Irwin, three of the grantees in the former deed, and eleven others, describing them as trustees of the said Associate Congregation: *Habendum*, to them "their heirs and assigns forever, to the intent, for the use and in trust for the members who then were, or thereafter might be *in full communion with*, and should comprise the associate congregation of Cambridge, in accession to the principles then presently maintained by the Associate Synod of North America, and then under the inspection of the Associate Presbytery of Cambridge, belonging to said synod, and for such persons as the said members at any time thereafter might elect and choose from among themselves as trustees, and their successors in office, to be elected and chosen as aforesaid." Upon this half acre of land the church edifice was built in 1833, by subscription, at a cost of about \$9000.

In 1826 the society was incorporated under the general act by the name of the "Associate Congregation of Cambridge of the county of Washington and state of New-York," "adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America." The society, both before and after its incorporation, acquired other parcels of land which were conveyed in fee to the trustees by deeds expressing a consideration, and containing no conditions or limitations, nor any

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*Robertson against Bullions.*

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specification of the uses to which they should be applied. It also procured a library; its whole property, real and personal, being estimated at about \$13,000.

In 1808, this congregation, with the assent of the presbytery, called the defendant Bullions, who was duly ordained by the presbytery as its minister, and continued to officiate as such without censure, until 1838, when for certain alleged misconduct he was deposed by the presbytery and excommunicated with the lesser sentence of excommunication. He appealed to the synod, but his deposition and excommunication were confirmed. Notwithstanding this action of the ecclesiastical judicatories, a large majority of the congregation, including a majority of the trustees, adhered to Dr. Bullions, and continued him as their pastor, devoting the revenues of the congregation to his support. The trustees also refused to permit two clergymen sent by the synod to occupy the church edifice, and closed its doors against them. The minority of the congregation who sustained the action of the synod, organized separately, and elected separate trustees.

In 1839, the complainants, being a portion of this minority, in behalf of themselves and those who concurred with them, filed their bill setting forth the foregoing facts, and praying that the trustees be compelled to permit clergymen in good standing in the associate church to preach in their church edifice, and to appropriate the corporate property to support such preaching; and that the defendants be decreed to account for the property since the deposition of the defendant Bullions, and that the trustees be removed from office and deliver up the property, &c. The cause was brought to a hearing upon pleadings and proofs before the vice chancellor of the fourth circuit, who made a decree granting the relief prayed for, removing the trustees and requiring them to account. The respondents appealed to the chancellor, and their appeal was heard at a general term of the supreme court, and a decree made reversing the decree of the vice chancellor, and declaring the defendants to be the lawful trustees, and as such entitled to the property; but declaring also,

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that the defendant Bullions had been deposed, and that the trustees could not rightfully devote the revenues of the corporation to his support, and prohibiting his employment thereafter, until he should be restored to the office of the ministry. From so much of this decree of the supreme court as was against them the complainants appealed to this court. The respondents acquiesced in the whole decree.

*Samuel Stevens*, for the appellants.

*N. Hill, Jr.* for the respondents.

**SELDEN, J.** The defendants not having appealed from any portion of the decree of the supreme court, so much of that decree as declares that Dr. Bullions had been deposed from the ministry, and that the trustees could not rightfully appropriate the funds of the corporation to his support, while he continued so deposed, without the consent of all the members of the corporation, and as prohibits such appropriation for the future, is to be regarded as final and conclusive. This court can only review those parts of the decree from which an appeal is taken. (*Kelsey v. Western*, 2 Coms. 500.) It is not, however, to be inferred from this portion of the decree, that the supreme court intended to affirm the views of the trust, insisted upon by the complainants; because that part of the decree of the vice chancellor which declares the nature of the trust, was expressly reversed and annulled by the supreme court. The whole case therefore, except so far as it is involved in the simple prohibition in regard to the support of Dr. Bullions, is before this court; and in determining the questions which must necessarily be here decided in respect to the removal of the trustees, and their obligation to account, it becomes indispensable to pass to some extent upon the powers, duties and functions of trustees of religious corporations, the tenure by which they hold the corporate property, and the nature of the trusts committed to their charge.

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Two distinct views have been taken of the nature of the corporations formed pursuant to the statute of this state providing for the incorporation of religious societies. According to one of these views the society itself does not become incorporated, but only its trustees. The individuals composing the society, the persons associated for the purpose of religious worship, form no part of the corporation, and are not to be regarded in any sense as corporators, but simply as members as well after as before incorporation, of a voluntary association, without unity, except such as may be produced by the assent of its members to its own self-imposed rules and regulations. The trustees in this aspect, constitute a body corporate entirely separate and distinct from the society, created for the sole purpose of receiving and holding the legal title to the property, and devoting it to the purposes and objects of the society, which is supposed to retain its distinctive characteristics as a mere voluntary association, in no degree merged in the corporation, even in respect to its temporal and secular concerns. The consequence of this view of the subject would be, that the trustees of a religious corporation are not to be regarded as the managing officers and agents of the society, clothed with the aggregate powers of the corporators, representing their interests and entrusted with a discretionary charge of their temporal affairs, as in other corporations, but their relations to the society are those simply of a trustee to his *cestui que trust*, as understood in equity. Were this view established, its effect would probably be, to devolve upon the courts of equity the administration of the entire property of religious corporations throughout the state, a jurisdiction bringing with it as its inevitable concomitant, enumerable judicial enquiries into modes of faith, shades of religious opinion, and all those subtleties which attend the diversities of religious belief.

The other view assumes that the society itself is incorporated; that the previous voluntary association is merged in the corporation, so far as its secular affairs merely are concerned; that the trustees are not the body corporate itself, but merely

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its officers, to whom is committed the custody of its property, and the management of its concerns ; that the members of the association form the constituent body, the legal entity which is represented by the trustees, and that the latter are clothed with the customary discretionary powers which appertain to the managing officers of all civil corporations ; modified it is true in some degree, by the mixed nature of the body which they represent, and the peculiar objects of the incorporation.

The argument by which the former of these views is sustained, rests mainly upon that clause in the third section of the act authorizing these incorporations, which, after providing for the election of these trustees, declares, not that the society, but that such trustees and their successors shall by virtue of the act, be a body corporate, by the name or title expressed in the certificate. But while I do not deny the force of this and the other arguments adduced in support of this construction of the act, I nevertheless insist that the arguments against it are too strong to be resisted. In the first place, such a construction is adverse to the universal popular sentiment in respect to the law in question. To prove this I need only refer to the names adopted by the various religious societies upon becoming incorporated. The following list was taken promiscuously from the records of religious corporations in Monroe county, viz : Churchville Presbyterian *Society*. First Congregational *Society* of Mumford. Associate Reformed *Association* of Beulah. Adams' Basin Free Church *Society*. Baptist Church and *Society* of Sweden. Society of *Christian Brethren* in Rochester. St. Peter's Presbyterian *Congregation*, Rochester. Fifth Presbyterian *Society and Congregation* of Rochester.

Of the great number of religious corporations in the county almost all bear names similar in character to these. The trustees are sometimes, though rarely named.

The founders of these corporations must have supposed, that it was the society or congregation that was incorporated. I hazard nothing in saying, that this has been the general under-



standing throughout the state, ever since the passage of the acts in question.

But this view of the nature of religious corporations is not only opposed to the general sentiment of the people, but is repugnant also to judicial construction so far as any has ever been given to the acts in question. In the case of *The Baptist Church, &c. v. Witherell*, (3 Paige, 296,) Chancellor Walworth treats, throughout, the society or congregation as the corporate body, the members of the society as corporators, and the trustees as the mere officers of the corporation. He says: "At the time the deed of Norton and wife was executed conveying the property to this society by their associate name, the statute was in existence, by which the members of the society were authorized to *incorporate themselves* whenever they thought proper." Again he says: "My opinion therefore upon the facts now before me is, that the corporation organized on the 6th of September, *succeeded to* the temporal rights of this society; and that the *trustees of that incorporation* are legally entitled to the possession and control of the meeting house and other temporalities of the congregation." And again, "The fact that the *corporators*, whom the complainants [the trustees] *represent*, own two-thirds of the pews, cannot alter the rights of the parties." The same view is taken in the subsequent case of *Lawyer v. Cipperly*, (7 Paige, 281.) So in the case of *Miller v. Gable*, in the late court of errors, (2 Denio, 492,) Gardiner, president of the court, speaks of trustees as "the representatives" of the congregation, and of the members of the latter, as *corporators*. It is clear therefore that if the popular understanding of the act authorizing religious corporations be an error, it is one in which the most enlightened of our courts and judges have participated.

The view of the act we are combating is contrary to the general scope and language of the act itself. It stands opposed in the first place to its title, which is "An act to provide for the incorporation of religious *societies*." It is irreconcilable with section nine of the act, which provides "That whenever any religious corporation within this state, other than the chartered

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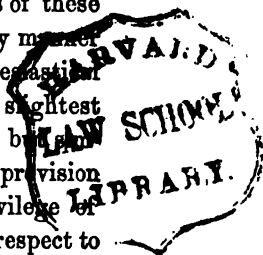
corporations, shall deem it necessary, and for the interest of such religious corporation to reduce *their* number of trustees, it shall and may be lawful for any such religious corporation, to reduce *their* number of trustees at any *annual meeting*." The trustees have no annual meeting; but this section authorizes the *corporation* to reduce the number of *their trustees*, at an annual meeting. This admits of but one construction. Again, this view is directly repugnant to the 14th section of the act which provides "that the *corporation* of the Methodist Episcopal Church in the city of New-York, shall be and hereby are authorized to continue to elect nine trustees of the said corporation." Here the congregation in whom the right of election rests is styled the corporation in the act itself.

It cannot, I think, be necessary to pursue this subject further, although there are other portions of the statute which equally conflict with the view, that the trustees and not the society constitute the body corporate. I think it clear, therefore, that the ~~views~~ which appear to have been generally entertained by both courts and people upon this subject are correct; that the ~~societies~~ are themselves incorporated; that their members are the corporators, and the trustees the managing officers or the corporation.

What then are the powers, rights and obligations of this class of corporate officers, and to what extent has this court jurisdiction over them? These questions are to be answered in view of the statute authorizing the incorporation of these societies, and the rules which regulate other corporations of the same legal character, and their officers; and not with reference to those peculiar principles which are applied to trusts by courts of equity. These officers are trustees in the same sense with the president and directors of a bank, or of a railroad company. They are the officers of the corporation to whom is delegated the power of managing its concerns for the common benefit of themselves and all other corporators; and over whom the body corporate retains control, through its power to supersede them at every recurring election.

This is the plain inference to be drawn from the statute itself. Section four provides, among other things, not only that the trustees may take into their possession and custody all the property real and personal of the corporation, and may purchase and hold additional property, and demise, lease and improve the same for the use of the society, and repair, alter and erect church edifices, school houses and other buildings; but also that they may "make rules and orders for managing the temporal affairs of such church, congregation or society, and dispose of all moneys belonging thereto, and regulate and order the renting the pews, in their churches and meeting houses, &c., and *all other matters* relating to the temporal concerns and revenues of such church, congregation or society." These are broad and sweeping powers, and the reason for their amplitude is to be found in the policy of the legislature, which aimed to produce an entire separation between the spiritual and temporal concerns of these associations, and to prevent the latter from being in any manner brought under the control and management of the ecclesiastical judicatories. It was not designed to interfere in the slightest degree with the proper functions of these judicatories, but simply to limit them to their appropriate sphere. The provision giving to every member of the congregation the privilege of voting, and the entire omission of any requirement in respect to the religious views or opinions of the persons to be elected as trustees, afford unmistakeable evidence that no very rigid adherence to any particular creed or doctrine was contemplated, so far as concerned the management of the temporal affairs of the society; but that it was intended to leave all this to be regulated and controlled by the members of the corporation through the exercise of their legitimate corporate powers.

It follows from this view, that the supreme court were entirely right in holding, in this case, that these incorporated societies are not to be regarded as ecclesiastical corporations, in the sense of the English law, which were composed entirely of ecclesiastical persons, and subject to the ecclesiastical judicatories; but as belonging to the class of civil corporations to be con-



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trolled and managed according to the principles of the common law, as administered by the ordinary tribunals of justice.

The question then arises, to what extent had the late court of chancery jurisdiction and control over the officers of civil corporations, in respect to the performance of their official duties? This question was ably discussed by Chancellor Kent, in *Attorney General v. Utica Insurance Company*, (2 *John. Ch.* 371.) He there held, that the court of chancery did not possess any general supervisory control over corporations of this character, and inclined to the opinion that the court had no jurisdiction whatever, even in a case of abuse by a corporate trustee, or other officer of his trust, by a perversion or misapplication of the funds of the corporation.

But, if it be admitted that a court of equity has power, by virtue of its general jurisdiction, over every species of trust, to interfere at the instance of a corporator, in cases of gross violation of duty by the managing officers of a civil corporation, which is at least doubtful; the question still remains, *how* may this jurisdiction be exercised? Does it extend to the removal of the officers of the corporation? It is difficult to conceive from what source, the court, independent of legislative enactment, could derive such a power. This class of officers receive their authority directly from the sovereignty of the state. The statute prescribes their qualifications, the mode of their election, and the tenure of their offices. What power has the court of chancery, or any other court, to set aside the statute; to impose conditions to the holding of the office which the statute does not impose? There is a wide difference between this description of officers and mere private trustees, whose powers rest solely upon individual contract. There, if the conditions of the contract be violated, the office is rightfully forfeited; and the court may enforce this forfeiture at the instance of the party aggrieved. But the powers of corporate officers have a source above that of mere private contract, over which the court of chancery has no paramount authority. No such power was ever asserted or claimed by the English court of chancery. On

the contrary, when the question arose in the case of the *Att'y Gen. v. The Earl of Clarendon*, (17 *Vesey*, 491,) the power was peremptorily denied. "This court," said the master of the rolls, "I apprehend, has no jurisdiction, with regard either to the election or amotion of corporators of any description." There is a class of English cases, of a different character, which have been sometimes referred to in discussions on this subject, but which afford no support to the doctrine contended for here. They are cases where a *corporation* is made a trustee, having no beneficial interest in the fund. There, if the corporation grossly abuses the trust, it will be removed by the court of chancery, in the same manner as an individual trustee. Such was the case of *Ex parte Greenhouse*, (1 *Madd.* 92.) This is merely the exercise of the ordinary jurisdiction of the court, and is widely different from the removal of corporate officers for a violation of their duty to the corporation.

The power here denied has been admitted by one or two of our judicial officers. (See *Lawyer v. Cipperly*, 7 *Paige*, 281; *Bowden v. McLeod*, 1 *Edw. Ch. R.* 588;) and was exercised by the assistant vice chancellor of the city of New-York, in the case of *Kinskern v. The Lutheran Churches*, (1 *Sandf. Ch. R.* 439.) The vice chancellor went so far in his opinion in that case, as to authorize a decree, not only removing the trustees, but disfranchising a portion of the corporators, and prescribing who should be permitted to vote at the new election, to be held under the supervision of a master of the court; thus entirely superseding the statutory provisions prescribing the qualifications of electors. But the eminent counsel for the complainant, in preparing the decree, seems to have omitted entirely to avail himself of the privilege of disfranchisement thus conceded to him; an omission which is somewhat significant of his own opinion upon the point. This case is, in my judgment, in conflict with principle, and wholly unsustained by authority, in so far, at least, as it asserts the original power of the court of chancery to remove the trustees of a corporation regularly elected, in pursuance of the provisions of the statute, and to

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substitute upon a new election qualifications for electors defined by itself, instead of those prescribed by the statute.

But in addition to the absence of all authority in favor of such a power at common law, the express provision of our statute, conferring the power upon the court of chancery in regard to corporations in general, and excepting religious, and one or two other classes of corporations, affords affirmative evidence, that independent of the statute, the power did not exist. (2 R. S. 462, § 33, and 466, § 57.) The supreme court, therefore, were clearly right in denying the existence of this power.

This brings us to the consideration of the alleged trust in the present case. In the view I take of the case, it is unnecessary to inquire as to the effect of the deed of July, 1786, or whether a court of equity would sustain the right of the congregation to an equitable fee under that deed, agreeably to the obvious intent of the parties, or compel a further assurance to effectuate that intent; but I shall consider the case as though all the rights, either legal or equitable, of the congregation or its trustees, derived under the first deed, were fully merged in the second. Under this deed the persons named became seised of an estate in fee, which they held subject to the trust expressed in the deed, until the congregation became incorporated in 1826. What then was the effect of that incorporation upon the title to this property, and upon the trusts under which it was held? We are saved the necessity of inquiring whether the title actually passed to the corporation; because, the counsel on both sides concede that such was the effect of incorporating the congregation.

A question arises as to the construction of the clause in the deed limiting the trust. If by members "in full communion," &c., is intended members of the church, or the body of covenanted professors of a certain faith, as distinct from other members of the association, which I suppose to be its true interpretation, then prior to the incorporation the title to the property was held not for the benefit of the congregation at large, but for the ex-

clusive use and benefit of the members of the church of a particular connection.

What effect then had the transfer of the title to the corporation upon this trust? This involves the inquiry, whether trustees of a religious corporation can take a trust for the exclusive benefit of a *portion* of the body, whose interests they represent, and whose officers they are. In the case of *Williams v. Williams*, decided by this court in January last, it was held that the trustees of such a corporation might take a bequest in trust for the support of a minister, that being one of the *general* objects for which the corporation existed. Denio, J., in that case says: "The object of this bequest is, the support of a minister, which is one of the most prominent of the objects for which these corporations are created. It is not essential to the validity of a bequest to a religious corporation, that it should be given generally, for all the purposes for which it may be legally used, or for *any* to which the trustees may see fit to devote it. This is apparent from the language of the provision as well as from the reason of the case. These corporations are authorized to take property, for the use of the society, 'or other pious uses,' which plainly shows that a benefactor may apply his bounty to the whole, or any one or more of the various purposes for which the corporation are authorized to hold property." (*MS. Opinion.*) The learned judge in this passage nowhere intimates, that the trustees of an entire corporation can take and hold property for the sole benefit of a portion of the members of that corporation, and exclude the other members from all participation in its use. His language, in my view, tends strongly to repel any such conclusion. He says they are authorized to take property for the use of *the society*: and that they may take it for any of the objects for which the *corporation*, that is, of course, the corporation as an entirety, was created. It would be difficult, I think, to maintain, that it would be compatible with the office and duties of trustees of a religious corporation, that they should take and hold and administer the revenues of property, from the benefits of which a portion of the corporators must be excluded. It

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would prove an entering wedge of division, the force of which even Christian charity and forbearance would scarcely be able to resist. But the unanswerable objection to such a trust is, that it is not authorized by the statute, and is inconsistent with its general scope and object, as well as with its terms.

It follows from this, that when the title to the property in question passed, as it is conceded it did, to the trustees of the corporation, by the voluntary act of all the parties interested either as trustees or beneficiaries, the trust, if its character was such as we have supposed, was merged; or was at least transmuted into a trust, for the benefit of the entire corporation. No question arises here in regard to the effect of this change, as between the trustees and the original grantor or his heirs. The exclusive trust in favor of members of the church of a particular faith, if such a trust existed, being thus at an end, the title stands as though it had been conveyed to the trustees for the use and benefit of the corporation generally.

But it is said that the nature of the trust may be ascertained, not only from the language of the deeds by which the property is conveyed, *but may be inferred from the tenets, faith and practice of the creators of the fund*; and hence that it is to be inferred in this case, that a trust was intended in favor of those only who adhered to the principles and practices of the Associate Synod of North America. This doctrine, if it means any thing more than, that where the language of the deed is ambiguous it may be explained by proof of the surrounding circumstances, I deny. It is at variance with well established principles, and rests, as I conceive, upon no sound and reliable common law authority. In the first place, conditions and limitations are not to be raised by inference or argument. (*See 4 Kent's Com.* 132.) The law favors the free and untrammelled alienation of property, simplicity in its title, and freedom in its use; especially in this country: and every presumption is against the existence of limitations, restrictions or qualifications.

But the English cases upon which this doctrine of implied restriction is supposed to rest, do not support it. The leading



cases, and those usually relied upon to sustain it are, *Attorney General v. Pearson*, (3 *Meriv.* 353,) and those relating to the Lady Hewley charities, viz. *Attorney General v. Shaw*, (7 *Sim.* 309;) and same case in the house of lords, (9 *Clark & Fin.* 355.) The doctrine of these cases has been so perverted and misapplied that I find it necessary to give to them a somewhat extended examination. They seem to me not to have been fully analyzed when referred to in the cases which have been made to rest upon their authority.

In *Attorney General v. Pearson*, a meeting house and lot, belonging to a congregation of Protestant dissenters in Wolverhampton, was held by trustees; the trust being expressed in the deed to be "for the worship and service of God." The deed also contained this clause, viz: "That if at any time thereafter meetings for the worship and service of God, should be *prohibited by law*, and thereby the meeting house should become useless, it should be lawful for the trustees for the time being to sell and dispose of the same," &c. The deed bore date in 1701. The contest was between a majority of the trustees who were Unitarians, and a minority of one who was a Trinitarian, for the possession of the trust property and the administration of the trust. The main question involved in the case was, whether the property thus held could be devoted, consistently with the trust, to the support of a Unitarian minister and the worship of a Unitarian congregation. It was alleged in both bill and answer, that the trust was created for the benefit of a congregation of *dissenters*; so that no question arose on that subject. The chancellor held, that the trust could only be administered for the benefit of a congregation, and the support of a minister professing Trinitarian doctrines. The reason is important, and the key to the whole case. It was, that worship by Unitarians and the preaching of Unitarian doctrines at the time the trust was created were prohibited by law; were indeed a crime, both by the common law and under the statute of 9 and 10 Will. 8, ch. 32; and it was not to be *presumed* that any person intended to establish a trust and a worship which was illegal and criminal.

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That this was the true reason upon which the decision was based, may be proved beyond doubt or cavil from the case itself. First, from the arguments of counsel, who rested the case almost entirely upon this ground. Sir Samuel Romilly, in arguing for the complainants, said, "In 1701 land was settled and a meeting house built *for the service and worship of God*, and there can be no question in a court of justice that by that expression is meant the worship and service of God according to the Trinitarian doctrine, *because* the opposite doctrine with respect to the nature and character of the Supreme Being had at that time no legal existence, being expressly excepted out of the toleration act." The whole argument upon that side was of the same tenor.

Again, this ground for the decision is plainly to be collected from the language of the chancellor himself; especially from that part of his opinion in which he asserts, that if the nature of the trust were to be determined upon the language of the deed alone, independent of the averments and admissions in the bill and answer, it would be the duty of the court to execute it in favor of the *established church*. After adverting to the allegations in the pleadings as sufficient to show that the trust was created for the benefit of a congregation of dissenters, he proceeds as follows: "I observe upon this, particularly, because I take it that if land or money were given for the purpose of building a church or a house, or otherwise for the maintaining and propagating *the worship of God*, and if there was nothing more precise in the case, this court would execute such a trust by making it a provision for maintaining and propagating the *established religion* of the country." No doubt the court would do this; and why? Simply because the *legal presumption* would be that the donor intended a trust and a worship which would be consonant to law. By parity of reasoning, when the trust was admitted to be for the benefit of dissenters, but was otherwise general, the court would limit it to dissenters who were within, in preference to those who were excepted from the toleration act.

Now this is all that is really decided in this noted case. It is true there is a great deal more said about religious and charitable trusts in general; but much of what is so said, and especially that part in relation to determining the nature of the trust, from the tenets and practices of its founders, is *obiter*; and is not law at this day, even in England, as I shall presently show. Why then should this case be so frequently cited and so much relied upon in this country? That it is so proves, that our courts have not always reflected upon the difference in this respect, between a country where all religions, at least all forms of the Christian religion, are tolerated and placed upon an equal footing, and one where a particular form of worship is established by law. The case under review, considering the nature of the point decided in it, is *wholly* without weight in this country; because we have no religious system to which it can apply.

We come now to the still more celebrated case of *Attorney General v. Shaw*, involving the construction of the Lady Hewley charities. (7 *Simons*, 290, *in note*.) Lady Hewley, by deed executed in 1704, had conveyed various estates in Yorkshire to trustees upon certain trusts, which so far as they are required to be noticed here, were as follows, viz: Out of the rents, issues and profits "to pay and dispose of such sums of money, yearly or otherwise, to such and so many *poor and godly* preachers for the time being of Christ's *holy gospel*, and to such *poor and godly* widows for the time being of *poor and godly* preachers of Christ's *holy gospel*, at such time and times and for so long time and times, and according to such distributions as the said trustees and managers for the time being or any four or more of them shall think fit." In this case as well as in that of *Attorney General v. Pearson*, a majority of the trustees had become Unitarians, and the bill was filed in behalf of the minority, to have the trusts declared in their favor, and to obtain a removal of the trustees who were Unitarians, and an injunction to restrain them from proceeding to the election of new trustees. It was admitted on both sides in this case, as

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it was in that of *Attorney General v. Pearson*, that the trust was not intended for the benefit of ministers of the established church. The questions therefore, were nearly indetical with those which arose in that case.

The case of *Attorney General v. Pearson*, however, arose upon a motion for an injunction, founded upon the pleadings alone. All that was there said therefore about a resort to extrinsic parol proof to ascertain the nature of a trust created by deed for religious purposes, was foreign to the case. But the case of *Attorney General v. Shaw* was heard upon pleadings and proofs. The complainants, adopting the dictum of the chancellor in *Attorney General v. Pearson*, had introduced a mass of evidence to show the particular religious tenets, faith and belief of Lady Hewley, consisting among other things, of extracts from her will; also from the will of Sir John Hewley, her husband, and from that of Dr. Colton, one of the trustees appointed by her. They also examined witnesses as to the meaning of the terms "godly preachers," "godly persons," "Presbyterians," &c., at the time of the foundation of the charities. All this testimony was read upon the hearing before both the vice chancellor and the chancellor, and as appears from their opinions, was taken into consideration. The vice chancellor put his decree exclusively upon the ground that it was shown that Lady Hewley was a Presbyterian, and that the Presbyterians of her day believed in the divinity of Christ, and in the doctrine of original sin; and hence he held that persons who denied those doctrines could not be entitled to the benefits of the trust. The chancellor, Lord Lyndhurst, however, although he adopted the views of the vice chancellor in this respect, also placed his decision upon the ground that Unitarian doctrines being prohibited by law, it was *not to be presumed* that Lady Hewley intended to create a trust in violation of law. After stating the statute, the effect of which was to prohibit the preaching of Unitarian doctrines, he says: "I cannot therefore, bring myself to the conclusion that Lady Hewley intended to promote and encourage the preaching of doctrines contrary to

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law; that she intended purely to violate the law, it would be contrary to every rule of fair construction and legal presumption to decide." Again he says: "On these *two* grounds then, each of which appears to me to be conclusive; first of all, that I cannot presume that this pious lady intended that her estates should be employed to encourage and promote the preaching of doctrines directly at variance with what she must have considered as essential to Christianity; and *that she could not intend to violate the law*: on those *two* grounds I feel myself, as a conclusion of fact, compelled to come to this determination; that she did not intend, under the description of *godly preachers*, to include those persons who impugned the doctrine of the trinity."

There was an appeal from the chancellor's decree to the house of lords, and my object is to show that in this court, where the whole judicial force of England was assembled, the doctrine of the vice chancellor and the chancellor, that the objects of the trust might be inferred from the tenets, faith and belief of Lady Hewley, was entirely discarded, and that the decree was affirmed solely upon the *second* ground assumed by the chancellor, viz: That a trust for the benefit of Unitarians would be *contrary to law*, and therefore, was not to be presumed. This may be conclusively shown from the report of the case in 9 *Clark and Finnelly*, 355. Upon the conclusion of the very elaborate and able argument of the cause in the house of lords, that body submitted to the judges a series of questions, upon which their opinions were required; only two of which it is necessary to notice. The first was as follows: "Whether the *extrinsic evidence* adduced in this cause, or what part of it is admissible for the purpose of determining who are entitled, under the terms "*godly preachers of Christ's holy gospel*," "*godly persons*," and the other descriptions contained in the deeds of 1706 and 1707, to the benefit of Lady Hewley's bounty." The fourth was this: "Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called

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Unitarian belief and doctrine, are excluded from being objects of the charities of that deed."

Seven of the twelve judges, together with the Chancellor, Lord Cottenham, delivered opinions upon these questions. Of these seven, only two, viz. Justices Coleridge and Williams, were of opinion that the extrinsic evidence was properly admitted. Justices Maule and Erskine were clearly of opinion that no portion of it was admissible. Baron Parke doubted whether any of it was admissible; and Baron Gurney and Chief Justice Tindal, together with Lord Chancellor Cottenham, were of opinion that none of it was admissible, except such as came within the ordinary rule, that parol evidence may be given of the "surrounding circumstances" under which a deed is executed, when its language is not explicit. The chancellor, after adverting to this as the true rule, says: I have thought it right to make these observations upon this matter of evidence; as otherwise, the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases. The second of the above questions, being the fourth put to the judges, was answered by the judges in the affirmative; all, except two or three, putting their opinions distinctly upon the ground, that a trust for the benefit of Unitarians being contrary to law, the presumption was against an intention to create such a trust.

So far, therefore, as the house of lords in England, with the aid of all the judges of the highest courts, can do it, the doctrine, that the nature of a trust for religious purposes, created by deed, may be inferred from parol evidence as to the religious faith and tenets of the founder, in the broad sense in which it seems to have been generally understood, is overthrown; or, at least, the doctrine finds no support in this case concerning the charities of Lady Hewley.

But, were it otherwise, and were we to infer in this case, either from the evidence on this subject, or from what appears upon the face of the deed, or any other source, that a trust was intended in favor of persons of a particular religious faith; then

I hold it to be clear, that a religious corporation in this state can be the recipient of no such trust, for the reason, that its execution would be entirely inconsistent with the provisions of the act authorizing such incorporations. This can be readily shown. The trustees are authorized by section 4, to purchase and hold real and personal estate, for the use of the *church, congregation or society*. If they may take a trust limited, as supposed, it may become their duty to administer the trust for the exclusive benefit of a portion only of the congregation or society. This is not authorized by the act. It is repugnant, not to the section to which I have referred alone, but to various other provisions. Section 7 prescribes the qualifications of electors, and it is not in the power of the congregation, nor of any portion of the society, or even of the courts, to change these qualifications, or prescribe any other. The majority of the congregation may be composed of persons of any religious faith, or of no particular faith, and still, their right to vote, and to control the election, is not affected. This is inconsistent with the idea, that the trustees can be expected to execute any trust, except such as is acceptable to the majority of the congregation.

But such a trust would be still more repugnant to the provisions of section 8. By that section the salary of the minister is put absolutely, and at all times, under the control of a *majority* of the congregation. The trustees have no control over the subject, but are imperatively required to ratify and pay the salary fixed by the majority. Whatever may be thought of the other provisions of the act, this section must forever give to the majority of the congregation the control over the employment of the minister. It would be in vain for any donor of property or funds to the congregation, to prescribe the religious faith of the minister to whose support the avails should be devoted; for, until the salary should be fixed by a majority of the congregation, not one dollar of the revenues of the society could be appropriated by the trustees to its payment.

The whole act shows, that it was the intention of the legislature to place the control of the temporal affairs of these societies

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in the hands of the majority of the corporators, independent of priest or bishop, presbytery, synod, or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees, and to fix the salary of the minister. The courts clearly cannot disfranchise any corporator who possesses the qualifications prescribed by the statute.

Suppose then, the majority in a particular congregation choose to change entirely their form of worship; how are they to be controlled? Should the court assume in the exercise of its jurisdiction over trusts to direct the trustees to employ a minister of a particular faith, the whole object of the direction might be defeated, by the employment of a minister wholly unacceptable to those who procured the interference of the court; and even if the court went so far as to direct *whom* they should employ, still the majority would have the right to fix the salary, and the court would clearly have no power to control such majority in the exercise of this discretion, which the statute confides wholly to them. The act has in truth accomplished what the public sentiment in this country would seem to demand, that is, the entire separation of the functions of the ecclesiastical and temporal judicatories, and has limited the former to their proper sphere of control over the spiritual concerns of the people. If this statute is properly construed, we shall have fewer examples of temporal courts engaged in the inappropriate duty of deciding upon confessions of faith, and shades of religious belief and points of doctrine too subtle for any but ecclesiastical comprehension.

The courts have not hitherto fully considered the broad distinction that exists between a voluntary association which may adopt such rules and regulations and such mutual obligations not inconsistent with law, as it may see fit, and a corporation whose powers and functions are prescribed by statute. If a society wishes to devote its property to an unchangeable form of worship and to tie down its members to a Procrustean bed of creeds and confessions of faith, it must remain a voluntary as-



sociation, and not commit the management of its affairs to a corporation.

I by no means deny that a grantor of property to the trustees of a religious corporation may annex such conditions to the grant as he may choose, not inconsistent with law; and that the trustees may take the property subject to the conditions. For instance, property may be conveyed to them to be held *so long* as the society continues in a certain ecclesiastical connection; or so long as it supports a minister of a certain faith: and this condition if explicit and clear and free from all doubt or obscurity would be good. An uncertain condition would be void.

The title of the trustees under such a deed would be good so long as a majority of the corporators chose to abide by the condition; and when that was departed from, their title would be forfeited. This is widely different from a trust, which is to be enforced in opposition to the will of the majority.

It follows from these principles, that neither presbytery or synod had any control over the Associate Congregation of Cambridge in respect to the minister whom they should employ. That depended upon the trustees and a majority of the congregation. His deposition or excommunication had nothing whatever to do with the right of the congregation to employ him, so far as the administration of its temporalities was concerned; although it might subject them or some portion of them to spiritual censure or ecclesiastical penalties.

While, therefore, it is settled so far as these parties are concerned, by the acquiescence of the defendants in the decree of the supreme court, that the trustees had and still have no right to employ Dr. Bullions, there is no reason for following up that error by requiring them to account.

It may be well briefly to recapitulate here the principal points which I have attempted to maintain. They are—

1. That this court cannot review those portions of the decree of the supreme court not appealed from. 2. That a religious corporation under our statute, consists not of the trustees alone, but of the members of the society. That the society itself is

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incorporated, and not merely the trustees, and its members are the corporators. 3. That the relation of the trustees to the society is not that of a private trustee to the *cestui que trust*; but they are the managing officers of the corporation, and trustees in the same sense in which the president and directors of a bank or of a railroad company are trustees, and are invested in regard to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of similar corporate officers. 4. That an incorporated religious society, under our law, does not belong to the class of ecclesiastical corporations in the sense of the English law; which were composed entirely of ecclesiastical persons, and subject to the ecclesiastical judicatories; but are to be regarded as civil corporations, governed by the ordinary rules of the common law. 5. That if it be granted that courts of equity, by virtue of their general jurisdiction over trusts, may exercise some degree of control over the trustees of a religious corporation in cases of gross abuse of their trust; yet, they have no power to remove those officers, who derive their offices directly from the enactments of the legislature; nor have they power to prescribe qualifications for electors of such trustees, other than those prescribed by the statute. 6. That the trustees of a religious corporation under our statute, cannot take a trust for the sole benefit of members of the church as distinguished from other members of the congregation, nor for the benefit of any portion of the corporators to the exclusion of others, no trust being authorized by the statute except for the use and benefit of the whole society. 7. That where in a deed executed to trustees for religious purposes, the use is expressed in general and not in specific terms, it cannot be *inferred* from the religious tenets and faith of the grantor, that it was intended to limit the use to the support of the particular doctrines which he professed or the religious class to which he belonged: although if the language creating the trust be ambiguous, evidence of the surrounding circumstances, and among them perhaps of the faith of the donor, may be received, as in other

cases, to aid in its construction. 8. That the trustees of a religious corporation in this state cannot receive a trust limited to the support of a particular faith, or a particular class of doctrines, for the reason that it is inconsistent with those provisions of the statute which give to the majority of the corporators, without regard to their religious tenets, the entire control over the revenues of the corporation.

The decree of the supreme court should be affirmed.

W. F. ALLEN, J. Upon the incorporation of the religious society in 1826, under the name of the "Associate Congregation of Cambridge, of the county of Washington and state of New-York, adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America," the title to the property real and personal which had been theretofore acquired by the society by gift, grant, conveyance to trustees for the use of the members, or otherwise, vested in the corporation, and the trustees of the society thereupon and thereafter duly elected succeeded to the possession and custody of all the temporalities of the congregation, and were invested with all the powers and subjected to all the duties devolved upon trustees by the act for the incorporation of religious societies, passed April 5, 1813. (1 *R. S.* 4th ed. 1179.) It is not claimed that any part of the property which is the subject of this controversy was for any reason exempted from this consequence of the act of incorporation. The members of the congregation, having availed themselves of the benefits of the general law for the voluntary incorporation of religious societies, necessarily subjected themselves to all its provisions; and the rights and privileges of individual members, the qualifications of electors, the powers and duties of the trustees, and the rules for the enjoyment, employment and disposal of the temporalities of the body corporate must be sought for in the act under which the corporation was created. The church proper, as a collective body of Christians who have made a public profession of the Christian religion and are united in fellowship and com-

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munion under the same pastor and form of church government, is entirely distinct from the ecclesiastical society formed under the act; and while the professing members of the church have, as such, rights and privileges accorded to them, and duties imposed upon them which are not common to the non-professing members of the congregation, as corporators the rights and privileges of all are equal.

It follows, that while for all the purposes of this case it may be assumed that so long as the members of the Associate Congregation of Cambridge remained unincorporated they could provide for an administration of their funds in such manner, and an appropriation of their property to such purposes not inconsistent with the laws of the land as they pleased, and might restrict the use of their property to those who professed a common faith with them and submitted to the same church discipline, and might lawfully exclude all others from a voice in the affairs of the body, upon becoming incorporated under the general provisions of law these peculiar and exclusive rights and privileges were surrendered, and thereafter the property of the society became the property of the corporation, to be managed and controlled for the benefit of all who by the act are recognized as members and entitled to the rights of membership. It is not material, therefore, to inquire into the effect of the clause in the deed from Jonathan French, which it is claimed created a trust in the property conveyed for the exclusive benefit of the members of the church in full communion. (1) The benefit of that trust, if any such at any time existed, was voluntarily relinquished by the beneficiaries at the time of the incorporation, and in that relinquishment the complainants and all others, so far as appears, acquiesce. (2) It is not claimed that the property is held for any "pious use" other than for the benefit of the society, and there is no way in which it can be administered under the act for the benefit of any one class, to the exclusion of other members of the congregation entitled to vote for trustees and eligible to that office.

The bill charges that the property of the congregation was

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and still is held by the trustees "in trust for the sole and only and exclusive purpose of being devoted and appropriated solely and exclusively to the support and maintenance of the preaching and teaching the gospel, and the administration of divine ordinances in said associate congregation, according to the aforesaid principles of faith and practice, discipline and government of said Associate Church of North America. According to which principles, no minister who is under sentence of excommunication can be permitted to occupy the pulpit, or administer divine ordinances, in said associate congregation." The defendants, by their answer, admit this to be true, and the final decree of the supreme court is based upon the truth of this allegation, and proceeds upon the assumption that the property was and is held upon the trusts, and for the purposes named. The defendants have not appealed from any part of the decree, and so far as it adjudicates upon questions involved in this litigation adversely to them, it is conclusive upon them. They have acquiesced in the decree, and it is not open for review upon this appeal at their instance.

But for the admission in the answer, and the implied adjudication of the supreme court, I should deem it very questionable whether a trust for the particular and limited purpose claimed, could be predicated upon the description of the beneficiaries or the particular name by which they were mentioned in the grant of the property. There is nothing in the grants requiring the property to be devoted to the preaching or teaching of the gospel in conformity with the tenets and doctrines of any particular denomination, or for the benefit of a church holding a particular ecclesiastical connection with any other body, unless it can be implied from the name which the association assumed, and by which they were at that time known. But for the purposes of this appeal, this is not an open question. One other important question is definitively settled by the judgment of the supreme court, from which no appeal has been taken, to wit, that the defendant Bullions had been, and at the time of filing the bill of complaint, was deposed from the ministry, and that

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the trustees of the corporation could not rightfully or lawfully appropriate or apply the property without the consent of all the members of the corporation to his support, nor allow him to preach in the church edifice belonging to the corporation; and that the trustees should be enjoined from the application of said property to the support of Dr. Bullions, and from permitting him to preach in the church edifice until he should be restored to the office of the ministry. Although we might be of the opinion that the proceedings against Dr. Bullions, and those of his church who adhered to him, were not conducted with all that charity, brotherly love and forbearance, which should have been expected, the action of the church judicatories, or the effect of such action upon the rights of the parties, are not before us upon this appeal.

The appellants insist that the supreme court erred in the reversal of that part of the decree of the vice chancellor removing the trustees from office, and providing for the election of others in their stead. The power of a court of equity in this state to prevent a diversion of the temporalities of a church from the purposes to which they were devoted, and compel the due execution of a trust by the officers of a religious corporation, is one thing, while the power to remove the officers for an alleged diversion of the trust property, and consequent abuse of the trust, is quite a different thing. The former power may be conceded upon principle and authority to be inherent in every court having, in virtue of equity powers, jurisdiction over trusts, without advancing at all in the argument to establish the latter power. A court of chancery in the exercise of its jurisdiction over trusts, proceeds in a limited sense *in rem*, and by its decree acts upon the trust fund or property, taking action as to persons only so far as may be necessary to accomplish the end; and when the person proceeded against is a mere trustee, having no relation, official or otherwise, to the property, the *cestuis que* trust or third persons, other than as the depositary of the legal title for the purposes of the trust, it is very proper in cases of a gross abuse of the trust, endangering the safety of the fund

and the interest of the beneficiaries, to transfer the title from the faithless trustee, and vest it in one more worthy. But when the trust is incident to an office, or grows out of the relation of the parties, it is more than questionable whether the powers of the court extend to the removal from office, or the destruction of that relation to which the trust is an incident. The power is not necessary to the performance of the proper functions of the court in compelling the execution of the trust. Municipal officers may be *ex officio* trustees for the administration of funds for the benefit of portions or of the entire community; and yet it would hardly be claimed that for an abuse of such trust they could be removed from office by the decree of a court of equity; and whether the trust duties constitute the principal, or but a small part of the duties of the office, is not material. The office and officer are distinct from the trust and trustee; the latter are subject to the direction of the court of chancery; the former not.

The cases in the English courts cannot be relied upon as authorities for the jurisdiction in this state, or safely followed as precedents, for the reason that there is no analogy between our system and the laws under which religious societies are incorporated and their temporal affairs managed, and the charities and trusts for religious purposes in England, in respect to which the decisions have been pronounced. *Knicker v. The Lutheran Churches of St. John's and St. Peter's, and others*, (1 Sandf. Ch. R. 439,) is the only direct authority in support of the position, that trustees of a religious corporation may be removed from office for acts done in respect to the property of the corporation; and this, I think, unsupported either by principle or authority. The learned assistant vice chancellor relies upon the jurisdiction of the court of chancery over charities, independent of any statute, and the decisions of the English chancery in respect to private charities. He also cites *Lawyer v. Cipperly*, (7 Paige, 281,) in respect to which it is sufficient to say, that the chancellor did not decide that the court had authority to arrest a breach of trust like the one in question, by removing the trustees from office.

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The statute has prescribed the mode and manner of electing officers of religious corporations, and the qualifications of electors; and officers duly elected, by properly qualified electors, cannot be removed from office, without, to some extent, disfranchising both the electors and the person chosen to office, and depriving them of the rights secured to them by law.

Provision has been made by statute for the suspension or removal of trustees and officers of corporations other than incorporated library societies, religious corporations and Lancasterian and select schools, from office, for abuse of trust, or gross misconduct. (2 R. S. 462 § 33, § 57.) This legislation on the subject shows, 1. That the legislature did not suppose that, independently of the statute, the court of chancery had power to remove a director or trustee of any corporation for any cause; and 2. That they did not deem it expedient to vest such power in the court, in respect to the corporations excepted from the operations of the act, religious corporations being within the exception. The provision was new, and introduced to remedy evils then existing. The vice chancellor exceeded his power in the removal of the trustees from office, and the reversal of that portion of the decree by the supreme court was right.

The claim of the complainants for an account of the rents and profits of the property from the time of the deposition of Dr. Bullions from the ministry, was properly disposed of by the supreme court. 1. The right of the defendants, who are trustees, to the custody of the property being established, it is not seen upon what principle the complainants, a small minority of the members of the association, can compel an accounting to them for the income. To whom should the amount which upon an accounting might be found due be paid? Not certainly to the minority of the congregation, to reimburse them for expenses incurred in procuring the gospel to be preached by a minister of their own selection, and at a place other than the church edifice owned by the corporation. The calling of a minister is doubtless, by the church as a body, distinct from the incorporated society, but the regulation of the amount and the payment



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of the salary is within the control of the society, and the amount is to be ascertained by a majority of those entitled to elect trustees. I do not understand that it is claimed that the trustees have refused to appropriate the income of the property to the payment of a pastor thus called, and whose salary has been ascertained and fixed according to law. 2. The trustees have acted in good faith, and as they supposed and as is tolerably apparent from the proof, in accordance with the wishes of a large majority of those entitled to a voice in the premises. The defendants have derived no personal pecuniary benefit from the use of the property, and the complainants have not been deprived of profits or possession to which they had any legal right, to the exclusion of the defendants and a majority of the members of the congregation.

There is no reason to suppose that the trustees will refuse properly to apply the property of the society to the support of gospel preaching in the church edifice, whenever a minister shall be called and settled, and the decree pronounced by the supreme court will prevent a diversion to any unauthorized purpose. It was not necessary or proper, therefore, to go farther than to restrain the defendants from the application of the fund to the support of Dr. Bullions and his ministry. The discretion of the supreme court in respect to costs, was properly exercised.

The decree of the supreme court should be affirmed, with costs of this court.

DENIO, J., concurred in the opinion of ALLEN, J., and dissented from the 8th proposition stated by Selden, J. GARDNER, Ch. J., PARKER and EDWARDS, Js., concurred in the conclusions of Selden, J. RUGGLES, J., was absent.

Decree affirmed.

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Humphrey *against* Chamberlain.

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HUMPHREY and another *against* CHAMBERLAIN.

The supreme court has not power to relieve a party from an omission to appeal to the general term from a judgment within the time prescribed by law. *Per* DENIO, J.

Nor should it attempt to do so by ordering the judgment to be set aside and re-entered as of a subsequent date. *Per* DENIO, J.

But where such an order was made at a special and confirmed at a general term of the supreme court; *Held*, that no appeal would lie from the same to this court.

Section 11 sub. 3, of the code contemplates an order made in a proceeding based upon a judgment and assuming its validity.

MOTION to dismiss an appeal. The judgment of the supreme court in this cause, upon a report of referees, was entered on the 9th day of April, 1853, in the clerk's office of Monroe county. It was in favor of the defendant for \$1679.19, damages and costs. The plaintiffs' attorneys obtained a stipulation from the defendant's attorney for time to make a case, and the yprepared and served one accordingly; but there was a question of regularity respecting the case, and no appeal from the judgment to the general term was taken within the time allowed by the code. On the 7th day of June, 1853, the plaintiffs' attorneys gave notice of a motion to set aside the judgment for irregularity on account of an alleged omission to give notice of the adjustment of the costs; "and also that the judgment be set aside to enable the plaintiffs to bring an appeal;" and likewise for leave to serve a case or bill of exceptions. The omission to give notice of appeal was shown to have been the result of inadvertence. The affidavits in opposition to the motion showed that notice of the adjustment of the costs had been waived by the plaintiffs' attorneys. On the 27th of June, 1853, the supreme court, at a special term, made an order upon this application, directing the judgment to be set aside and vacated, "and that the clerk of the county of Monroe forthwith re-enter the said judgment and docket the same." The plaintiffs were

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directed to give a bond to pay the judgment, with costs, in case it should be affirmed on appeal, and to pay \$10 costs of the motion; and they were to have further time to serve a case. This order was affirmed by the general term, and from the order of affirmance an appeal was taken by the defendant to this court. The papers presented by the plaintiffs on this motion contained a certificate of the justice who held the special term, stating that the judgment was not set aside on the ground of irregularity, but on the contrary was held to be regular; and that the order for re-entering it was made simply to give a new date to the judgment, so as to enable the plaintiffs to appeal.

*M. S. Newton*, for the plaintiffs, insisted that the order was not one from which an appeal would lie.

*H. R. Selden*, for the defendant.

*By the Court*, DENIO, J. The code prescribes the time within which an appeal may be taken from the special to the general term; and it is not in the power of the court to extend that period, or to allow an appeal when the time has been suffered to expire. (*Code*, §§ 332, 405.) As the legislature has seen fit to deny to the courts the power to relieve a party from the consequences of an omission to appeal within the period allowed by law, it was obviously improper for the supreme court in this case to attempt to effect the same thing indirectly, by affixing a new date to the judgment. (*Bank of Monroe v. Widner*, 11 *Paige*, 529.) But the order sought to be appealed from is not one from which an appeal to this court will lie. The portion of section eleven of the code, which is supposed to meet the case, is that which gives an appeal from a final order "upon a summary application in an action after judgment." (§ 11, *subd.* 3.) Reading the sentence in connection with the other parts of the section, it is evident that it contemplates a proceeding based upon the judgment, and which assumes its validity; and this is the construction which has been put upon it by this

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New-York Central Railroad Co. *against* Marvin.

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court. (*Sherman v. Felt*, 3 How. Pr R. 425; *Dunlop v. Edwards*, 3 Comst. 341.) It is not the policy of the code to allow a review, in the court of appeals, of interlocutory orders in an action, unless they are such as put an end to the suit and prevent the rendering of a judgment from which an appeal would lie, or unless there is an appeal from the judgment. Although there was a judgment in this case when the application was made, yet the effect of the order is to cause another judgment to be entered in its stead; and the latter thus becomes the final determination of the cause, and every step which preceded it is in its nature interlocutory, and not subject to review here, unless upon appeal from the judgment, as provided in the 1st subdivision of section 11.

Appeal dismissed.

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In the matter of the NEW-YORK CENTRAL RAILROAD COMPANY *against* MARVIN.

An appeal does not lie to this court from an order of the supreme court made at a general term, confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act, and refusing to direct a new appraisal.

On the application of the respondent under the general railroad act of 1850, commissioners were appointed to appraise the lands in question, who made their report, by which they were appraised at \$11,500, and the report was duly confirmed at a special term of the supreme court. From that decision Marvin appealed to the general term, sitting in the eighth district, where, after hearing counsel on both sides, a new appraisal was refused and the report and proceedings were affirmed. An appeal was then taken to this court, which the respondent moved on notice to dismiss.

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New-York Central Railroad Co. *against* Marvin.

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*J. H. Reynolds*, for the respondent.

*Geo. L. Marvin*, in person, contra.

*By the Court*, PARKER, J. Inasmuch as all remedies in courts of justice are, by the code (§1,) divided into actions and special proceedings, the application to the supreme court for the appointment of commissioners and the appraisal, report and confirmation must fall within the latter subdivision of remedies. In *Ex parte Ransom*, (3 Code Rep. 148,) it was held that the proceeding to assess damages on laying out of plank roads, under chap. 210 of the laws of 1847, is a special proceeding as defined by the code, and this proceeding is of the same character.

The code (§11, sub. 3,) allows an appeal from "a final order affecting a substantial right made in a special proceeding," and this language standing alone, would be sufficiently comprehensive to include the appeal in question. But we are to look also at the act itself, under which these proceedings were instituted, to see whether it was the intention of the legislature to except this proceeding from the operation of the general provisions of the code. Section 18 of the act, (*Laws of 1850, p. 211*,) allows either party to appeal to the supreme court from the appraisal and report of the commissioners, within twenty days after the confirmation of the report; and, on the hearing of such appeal, that court is authorized to direct a new appraisal before the same or new commissioners, in its discretion; and it is further provided that the second report shall be "final and conclusive," upon all the parties interested.

I think it was the intention of the legislature to prescribe, in the railroad act, an entire system for ascertaining the value of the lands taken. It contains no express provision authorizing an appeal. It gives to the supreme court the power of granting a rehearing but once, and, by declaring the second report "final and conclusive," it not only precludes any further action on the part of the supreme court, but cuts off also any

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New-York Central Railroad Co. *against* Marvin.

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appeal from such second report to this court. This restriction is, I think, evidence of a design to limit the extent to which litigation should be permitted on a mere question of appraising the value of land, and to confine it to the several steps and hearings expressly permitted by the act.

The appeal to the supreme court from the appraisal and report of the commissioners is authorized to be heard either at a general or special term of the court. This provision seems to indicate that an appeal to the court of appeals was not in any case contemplated by the legislature, because no such appeal would lie from a decision made at special term; and it cannot be supposed that it would be left by the legislature to the party appealing to the supreme court to decide whether or not any further appeal should be permitted, in electing whether his own appeal to the supreme court should be heard at the general or special term. It seems to me absurd to say that an appeal may be taken to the court of appeals from a decision of the general term, when none can lie from the decision of the same question at the special term. This would be holding the decision of a single judge at special term, to be of more reliability than the decision of three judges at general term, on the same question.

The supreme court is authorized to refuse a new appraisal, or to direct a new appraisal before the same or new commissioners, in its discretion. It is evidently intended that the supreme court shall have a broad discretion in its exercise of the supervisory power conferred. It has full power over the proceedings to see that no injustice is done. It may set aside a report where it is against the weight of evidence, or where there is reason to suppose that there has been partiality or prejudice. It reviews questions of fact as well as of law. The supreme court will not set aside a report for every technical error, when no injustice appears to have been done, but will exercise its discretion in regard to it. (*The Troy and Boston Railroad Co. v. The Northern Turnpike Co.*, 16 Barb. 100.) It is not to be supposed that an order of the supreme court so purely dis-

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New-York Central Railroad Co. *against* Marvin.

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cretionary, was intended to be the subject of review. The general rule is, that there is no appeal from an order, the making of which rests in discretion. It would be equally repugnant to our notions of the plan of our judiciary system, to suppose that it was intended that the questions of fact, almost always involved in appeals from appraisals of damages in railroad cases and in other like proceedings, were designed to be brought up for adjudication to the court of last resort. On the contrary, it would be perverting the purposes for which this court was established, to require it to review on appeal mere questions of fact. Its appropriate province is to decide questions of law.

The whole proceeding is a special creation of the statute, and seems designed to form a complete system of itself, entirely independent of the general provision of the statute authorizing appeals to this court.

The appeal must be dismissed, with ten dollars costs.

DENIO, J., took no part in the decision, being a stockholder in the road.

Appeal dismissed.

END OF CASES DECIDED AT JUNE TERM.

*Note.* RUGGLES, J., was prevented by sickness from hearing the cases decided at the June term argued, and therefore took no part in their decision.





CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW-YORK,  
SEPTEMBER TERM, 1854.

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MORSE *against* GOOLD and another.

A justice of the peace was not authorized by the revised statutes to issue an execution after two years from the rendition of the judgment.

But where an execution was duly issued and returned unsatisfied, he had power to renew it after the two years had elapsed.

The act exempting certain property from levy and sale on executions, (*Stat. of 1842, p. 198,*) applies to judgments and executions on debts contracted before as well as after its passage.

This act merely modifies the remedy for enforcing contracts, and neither destroys it or substantially impairs its efficiency. Therefore it does not conflict with the provision of the constitution of the United States, forbidding any state to pass a law impairing the obligation of contracts, and is valid.

The judgment of this court in *Danks v. Quackenbush*, (1 *Comst.* 129,) is not obligatory as a precedent, the members of the court having been equally divided in opinion on that case.

APPEAL from a judgment of the supreme court. The action was trover, for a span of horses, and was commenced in 1845.

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*Morse against Goold.*

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The defendants pleaded not guilty. The cause was tried before Mr. Justice Mullett, without a jury, in November, 1849. The facts were as follows: On the 13th of December, 1842, the defendants recovered a judgment against the plaintiff, before a justice of the peace, for \$44.48. The recovery was on a promissory note, executed by the plaintiff to the defendants on the 28th of November, 1841. On the 20th of April, 1843, the justice issued an execution upon the judgment in the usual form, returnable in ninety days, and delivered it to a constable; the execution was returned unsatisfied July 8th, 1843, and renewed by an indorsement thereon by the justice on the 27th of September, 1844, and redelivered to the constable to whom it was first issued. The execution was again returned unsatisfied in November, 1844, and was again renewed by the justice, by an indorsement thereon, the 15th of September, 1845, when it was delivered to another constable, and the horses in question seized and sold thereon by the request of the defendants. At the time of the levy and sale the plaintiff was a householder and worked a farm, and the pair of horses sold were his necessary and only team, and did not exceed in value \$150, and he then claimed they were exempt from levy and sale on execution.

The plaintiff claimed to recover, on the grounds—first, that the justice had no power to issue or renew an execution after the expiration of two years from the time the judgment was recovered; and second, that the horses were exempt from execution, pursuant to chapter 157 of the laws of 1842. The justice, before whom the cause was tried, ruled and decided, that the justice of the peace had power to renew the execution after two years from the rendition of the judgment, and that the same was legally renewed; and also, that the horses were not exempt from seizure and sale on this execution by the act referred to, because the judgment on which it was issued was recovered on a debt which was contracted and accrued prior to the passage of that act, and ordered judgment in favor of the defendants. The counsel for the plaintiff excepted. The judgment was affirmed by

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the supreme court, at general term, and the plaintiff appealed to this court.

*N. Hill, Jr.*, for the appellant.

*H. R. Selden*, for the respondents.

DENIO, J., delivered the opinion of the court.

Upon the question whether the execution in this case was legally renewed, two years having elapsed from the time of rendering the judgment at the date of the last renewal, I am of opinion with the defendants. The title of the revised statutes relating to courts held by justices of the peace, vests in such courts all the necessary powers which are possessed by courts of record. (2 R. S. 225, § 1.) This includes the power to issue executions or judgments rendered in those courts. Sections one hundred and forty-four, one hundred and forty-five, one hundred and forty-six, and one hundred and forty-seven of the same title, contain the special provisions deemed essential, relating to the issuing of executions, their renewal and the issuing of further executions, and the language is such as to show that each of these acts is considered as distinct and different from each of the others. An execution may be issued at any time within two years from the time of rendering the judgment. (§ 146.) If an execution be not satisfied, it may be from time to time renewed by an indorsement. (§ 145.) If an execution be returned unsatisfied, in whole or in part, a further execution may be issued. (§ 147.) Although this is not the order in which the sections stand in the statute, it is, I think, the order in which the sense requires them to be read. There is a plain distinction made between the issuing an execution, and the renewal of one, and it is the former only that the limitation of time is applied to. There is no limitation in terms as to the time of renewal. It is to be done from time to time, as the necessity of the case may require. I have no doubt but that the legislature had in view the practice in courts of record, which prohibited the issuing of an execution

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after a year and a day from the entering of the judgment, but allowed the issuing of an *alias* or other execution at any time after one had been issued in time and returned unsatisfied. The practice grew out of the presumption which was indulged, that the judgment might have been paid or released when it was seen that the creditor had neglected to sue out final process for such a length of time. That presumption was done away, when an execution was once promptly issued; and after that, delay would not prejudice; as the failure to make the money on the first execution, would account for it. I do not see but that this kind of reasoning is as applicable to justices' judgments as to judgments of a court of record. At any rate, I think the legislature has applied it to both cases. The language of the revised statutes, limiting the time for the issuing of executions in courts of record to two years from the entry of the judgment, is similar to that used in regard to justices' judgments; and the identity of the period within which it may be done in the two cases, furnishes an argument of some weight that the object and motive was the same in both. (2 R. S. 363, § 1.)

We have been referred to an act passed in the year 1840, (*Laws 1840, ch. 347,*) as giving a construction to the provisions in question. By this act a justice whose office has expired is allowed six months within which to issue and *renew* executions, whether he is re-elected or not; but if he is re-elected, he may issue executions within the time allowed by the revised statutes. An act passed in 1846, (*ch. 276,*) allows a justice, whose office has expired, two years after the rendering of any judgment before him, to issue and renew executions on such judgment. I do not see that these statutes assume the construction for which the plaintiff contends. On the contrary, the first act appears to make a distinction between the act of issuing and the renewing of an execution, which so far favors the construction contended for by the defendants; and as to the last one, it is sufficient to say, that the legislature might be willing to allow a person who had been a justice, but who was out of office, the right to issue an execution, when they would

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not entrust to him the duty of renewing it from time to time. The code of procedure does not provide in terms for a renewal of an execution, but limits the time for issuing one to five years from the entry of the judgment. I do not see that this has any bearing upon the question under consideration. Under it the issuing and renewal of an execution probably ought to be considered as the same thing, and it would be held that neither could be done after five years. If this were the only point in the case, I should be in favour of sustaining the judgment of the supreme court.

The conclusion which I have thus arrived at makes it necessary to examine the other question in the case. If the property, for converting which the suit was brought, was legally exempt from execution, the plaintiff was entitled to recover, though it should be admitted that the execution was regular and operative at the time of the seizure. The question as to the constitutional validity of the exemption act of 1842, which was before the late supreme court, in *Quackenbush v. Danks*, (1 Denio, 128,) and which came before this court in the same case upon appeal, (1 Comst. 129,) is consequently again presented; and it is eminently proper that so important a question should be finally determined. Although the judgment of the supreme court denying any effect to the act in respect to contracts made previous to its passage was affirmed by this court, yet, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, but the question must be regarded as entirely open. (*Bridge v. Johnson*, 5 Wend. 342; *Etting v. The Bank of the U. S.*, 11 Wheat. 59, 78; *The People v. The Mayor, &c. of N. Y.*, 25 Wend. 252.)

and 7 Wall. 167

The language of the act does not except executions for debts already contracted. It is general, and in terms applies to all future levies and sales on execution, without regard to the time when the debt was contracted or the judgment obtained; and we do not think the case is within the principle of *Dash v. Van Kleeck*, (7 John. 477,) and the other cases of that class, in which it has been determined that general language in an act of the

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legislature will not be held retrospective, to so as take away a vested right. The question depends essentially upon the same considerations, which are applicable to the point which we are about to consider, as to the constitutionality of the act; for if the creditor in this case, upon receiving the promissory note of his debtor, acquired a vested right, as an incident to that contract, to have his execution ultimately levied upon all the debtor's property not exempt by the laws in existence when the contract was made, the act providing for additional exemptions is clearly unconstitutional; and it will be unnecessary to resort to the somewhat forced construction by which courts have sometimes, in order to prevent injustice, annexed an implied exception to the general language of an act of the legislature.

The contracting of a debt does not in any legal sense create a lien upon the debtor's property. He is as much at liberty to deal with, and to transfer it *bona fide*, as though he were entirely free from debt. The right which a creditor, by becoming such, acquires is, to have the use and benefit of the laws for the collection of debts, which may be in force when he shall have occasion to resort to them to enforce his demand against the debtor. The constitution of the United States prohibits the several states from passing a law "impairing the obligation of contracts;" and the precise question in this case is, whether the act of 1842, which exempts from levy and sale on execution, (in addition to former exempt property,) "necessary, household furniture and working tools and team owned by any person being a householder or having a family for which he provides, to the value of not exceeding one hundred and fifty dollars," impairs the obligation of the contract antecedently made, by which the plaintiff for a valid consideration agreed to pay the defendants a sum of money. The most obvious method by which a contract may be impaired by legislation, would be the alteration of some of its terms or provisions, so that, assuming the validity of the law, the parties would be relieved from something which they had contracted to do, or would be obliged to do something which

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the contract did not originally require. This is not the case with this law, as applied to the contract in question. The right of the defendants to the money agreed to be paid, and the obligation of the plaintiff to pay it, remains as when the contract was made. But it is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor, under the legal remedies existing when the contract was made, are substantially defeated. With this necessary qualification the jurisdiction of the states over the legal proceedings of their courts is supreme. It may frequently be difficult to draw the line as to acts professedly affecting the remedy only between those which are within the legitimate province of the state legislature, and such as, overstepping those bounds, substantially impair the obligation of antecedent contracts; and it is, perhaps, impracticable to lay down in language a rule by which all such questions may be tried and determined. Chancellor Kent, when a justice of the supreme court, furnished a definition of the principle as precise, perhaps, as the subject is capable of. After stating that the constitution could not have an eye to the details of legal remedies, he declared that the provisions in question were not violated "so long as contracts were submitted, without legislative interference, to the *ordinary* and *regular* course of justice, and the existing remedies were preserved *in substance* and with integrity." (*Holmes v. Lansing*, 3 *John. Cas.* 75.) Every alteration in the course of legal proceedings affects, to a greater or less extent, the efficacy of the machinery for the collection of debts. The creditor's action for an existing debt may be rendered more or less speedy, stringent and effective, without raising any question under this provision of the constitution. The very thorough and radical change lately made in our practice by the code of procedure, was applied to existing causes of action where suits were not already commenced; yet it was never regarded as touching the obligation of prior contracts. In conformity with this principle, it has been repeatedly held that the right of im-

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prisonment for debt is no part of the contract, but only parcel of the remedy, and that it may rightfully be abolished as to existing as well as future contracts absolutely, or conditionally by means of insolvent laws. (*Sturges v. Crowningshield*, 4 *Wheat*. 122, 200, 201; *Mason v. Haile*, 12 *id.* 370; *Beers v. Haughton*, 9 *Pet.* 328, 359; *Cook v. Moffat*, 5 *Howard*, 316; 2 *Kent's Com.* 397; 3 *Story's Com.* § 1392, p. 268.) Nor is the law of limitations considered as a part of the contract; and hence the legislature may, consistently with the constitutional provision, enact a statute limiting the time within which actions may be brought to enforce demands where there was before no period of limitation, or may shorten the existing time of limitation; and such a law may operate upon existing contracts. (*Sturges v. Crowningshield*, *supra*; *Hawkins v. Barney's Lessee*, 5 *Pet.* 457; 3 *Story's Com.* § 1379, p. 251; *Smith v. Morrison*, 22 *Pick.* 430; *Call v. Hagger*, 8 *Mass.* 423.) By the revised statutes of this state, a landlord, whose tenant's chattels were taken in execution, was entitled to be paid his rent upon making a certain affidavit and giving a certain notice to the sheriff. In 1846 the legislature abolished this right, together with the right to distrain for rent in arrear; and the late supreme court held the enactment constitutional in its application to leases in existence when the act was passed. (*Stocking v. Hunt*, 3 *Denio*, 274.)

In Massachusetts, it is known that it has long been the right of a creditor to proceed against his debtor by a preliminary attachment, under which the property of the latter was seized and held to await the obtaining of judgment, when it was subjected to sale for the payment of the debt. In 1838 an insolvent law was passed, containing a provision, giving to the assignees the title to all the insolvent's property, *including any which might have been attached on mesne process*. This was held to apply to a debt contracted before the passing of the act, and to be a constitutional enactment. It divested the creditor, under certain circumstances, of his remedy by attachment, which existed in full force when the contract was made. (*Bigelow v.*



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*Pritchard*, 21 Pick. 169.) In *Walter v. Bacon*, (8 Mass. 468,) it was decided that an act of the legislature, confirming an unauthorized and illegal enlargement of the limits of a prison yard, which had been ordered by the sessions, was a good defense to an action on a prison bond which had been executed before the statute was passed. These authorities are exemplifications of the principle that legal remedies are in the fullest sense under rightful control of the legislatures of the several states, notwithstanding the provision in the federal constitution securing the inviolability of contracts; and that it is not a valid objection to legislation on that subject, that the substituted remedy is less beneficial to the creditors than the one which obtained at the time the debt was contracted. That this principle is a sound one, I cannot entertain the slightest doubt. Such legislation must of necessity belong to the states, for it is certain that it is not embraced within any of the grants of power to the general government, and in the nature of things can only be exercised by the state sovereignties. The change effected by the act of 1842 is far less important, in its operation upon existing contracts, than several of those which have thus been held unobjectionable. The right, for instance, to coerce a debtor by imprisoning his person, would be much more efficacious, in a large class of cases, than the power to levy on a team and a small amount of furniture, which he might or might not possess. There is no universal principle of law, that every part of the property of a debtor is liable to be seized for the payment of a judgment against him. The propriety of exempting certain articles of small value, but which were considered important to the comfort of the family of the debtor, was engrafted upon the law of the state before the revision of 1813, and the list of exempt articles has been from time to time increased down to the passage of the act of 1842; but the great mass of individual property has always been, and still is, left liable to the claims of creditors. According to the opinion of the supreme court, each of these acts ought to have been limited to future contracts; and until the prior cases had been disposed of, there must have

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been two kinds of executions, one embracing, and the other excepting the exempt property; for however trifling and unimportant it might be, the provision releasing it from the execution is considered, to that extent, a violation of all prior contracts of the debtor. This position, it seems to me, proceeds very much on the idea that the creditor has a specific lien coeval with the contract upon all the chattels of his debtor, which, as already remarked, is quite erroneous. When it is remembered that his right, so far as it is protected by the constitution of the United States, is limited to the benefit of the general laws of the state provided for the collection of debts, and to the continuance of such laws, in substance and with good faith, it seems clear, that any change which the policy or humanity of the legislature may make, which shall leave a substantial remedy, does not touch the obligation of prior contracts within the meaning of the constitution. The regulation prescribed by the act of 1842 is a general one. It professes to give the rule, according to which, during all future time, the rights of creditors are to be enforced; and it is not made to embrace past transactions because there existed any motive for relieving existing debtors, but in order that the course of legal procedure should be uniform. Men will judge differently as to the policy of these exemption acts, but their conformity with the constitution cannot depend upon the ideas which courts may entertain as to their wisdom and political expediency. The question is, whether the law which prevailed when the contract was made, has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice. Taking the mass of contracts, and the situation and circumstances of debtors, as they are ordinarily found to exist, no one would probably say that exempting the team and household furniture of a householder, to the amount of one hundred and fifty dollars, from levy on execution, would sensibly affect the efficiency of remedies for the collection of debts, though a case might possibly happen where the exempt property would constitute all that the debtor possessed. When the remedy of

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imprisonment was taken away, its effect upon existing engagements was tenfold more important; yet this was held not to be objectionable because of the right which the state legislatures must always possess, to modify and regulate the methods of legal procedure. I regard the act of 1842 as a provision clearly within the competency of the legislature, and one which they might lawfully apply to all future proceedings in courts, whether such proceedings should relate to existing or future causes of action.

A good deal of reliance is placed in the judgment I have been examining, upon two cases in the supreme court of the United States—*Bronson v. Kinzie*, (1 *Howard's Rep.* 411,) and *McCracken v. Hayward*, (2 *id.* 608.) In these cases a statute of the state of Illinois was declared to be a violation of the constitutional provision under consideration; and if the case now before the court came fairly within the principle of these adjudications, it would form a precedent which we could not, and which for myself I should not desire to, disregard. But I do not think there is any considerable similarity in the cases. The statute of Illinois did not profess to be a part of the ordinary and regular system for the collection of debts, but was special and exceptional in its character, and was evidently passed to meet a particular emergency, namely, to afford relief against a mass of indebtedness which the peculiar circumstances of some preceding years had led the citizens to contract. This is obvious from the fact that its operation is limited to existing contracts and to such as might be entered into prior to the first day of May then next, which was about two months after the passing of the act. It cannot be pronounced that the legislature of Illinois considered the provisions of this act as affording an adequate and sufficient or reasonable remedy for the collection of debts in ordinary cases; but the contrary is to be inferred from their declining to apply them generally to all future cases. Again; the act forbade the sale of the debtor's property, altogether, unless there should be offered for it, an amount equal to two-thirds of a valuation to be put upon it by three persons, one of whom was to be selected by the debtor. This was interpolating a new

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feature into the law and practice of judicial sales, and one which would be quite likely in many, if not in most cases, to render the remedy entirely nugatory. I should have found no difficulty in saying that no reasonably substantial remedy was left to the creditor under this act; but it would have been sufficient, in determining against the constitutionality of the law, to refer to the fact that all existing contracts, and such as should immediately be made, were by it taken out of the ordinary and regular system of legal remedies and subjected to new and exceptional rules, of an anomalous character, which were calculated to embarrass, and which might in many cases wholly defeat the creditor's remedy. The Illinois act subjected sales pursuant to a judgment of foreclosure of a mortgage to the same provisions, and thus directly violated one of the specific terms of that class of securities; and the first case referred to was a review of a judgment where the statute had been applied to a foreclosure case. In the other case the judgment was the ordinary one *in personam*, and in both cases the statute was, in my opinion, rightfully held to impair the obligation of the contract. I do not understand either of the cases to determine that the law, respecting legal procedure in existence when the contract was made, cannot be changed in such manner as to operate upon existing contracts. In the able and discriminating opinion of Chief Justice Taney, in the first case, the right to make such *changes* is distinctly asserted; and if the opinion in *McCracken v. Hayward* holds the contrary, it was unnecessary to go that length, and the doctrine would be hostile to the principle of several prior cases, and an unwarrantable restriction upon the powers of the state governments. It is evident that the court did not intend to embrace a case like the one under review. The chief justice expressly declares, in giving the opinion of the court in *Bronson v. Kinzie*, that a state legislature may, "if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments;" and in a subsequent case of *The Planters' Bank v.*

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*Sharp*, (6 *Howard*, 301, 330,) decided as late as 1848, Mr. Justice Woodbury, in giving the opinion of the court, enumerated laws exempting tools or household goods from seizure, among the examples of legislation respecting the remedy which might be constitutionally applied to existing contracts; and in *Bigelow v. Pritchard*, before referred to, Putnam, J., in delivering the opinion of the supreme judicial court of Massachusetts, said that the legislature might lawfully diminish the creditor's remedy to enforce payment, by exempting a part of the property of the debtor from attachment on mesne process or levy on execution; "for example, articles of furniture, beds and bedding, &c. necessary for a debtor and his family."

Upon the whole, I am of opinion that the statute of 1842 relates exclusively to the remedy, and does not touch the obligation of the contract within the meaning of that expression in the constitution of the United States; and moreover, that it cannot be classed among those legislative provisions which, professing to operate upon the remedy only, do nevertheless materially impair the obligation of the contract itself. I am therefore in favor of reversing the judgment of the supreme court on that ground, and of ordering a new trial to be had in that court.

RUGGLES, J., was not present at the argument, and took no part in the decision of the case.

Judgment reversed.

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*Brumskill against James.*

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*BRUMSKILL against JAMES and EAGLESUM.*

Where the direction as to the return of a commission required it to be enclosed in a wrapper, and deposited in the post office at Toronto by the commissioners, directed to W. B., Buffalo, "and a certificate *thereof* indorsed upon the wrapper by the commissioners," and the commission was received from the post office at Buffalo, post marked Toronto; *Held*, that it was not requisite that the certificate on the wrapper should state that the commission was deposited in the post office by the commissioners.

Where notes, offered in evidence as proved by a witness examined on commission, were attached to and returned with his deposition, were marked A and B, and had the names of the witness and the commissioners written upon them; and the witness in the deposition described the notes to which he testified, by dates, amounts, &c. corresponding with those of the notes offered, and stated that they were produced to him on his examination, marked A and B, and that he then wrote his name upon them; and the commissioners in their return certified that the notes attached to the deposition were produced to the witness on his examination, and he signed his name thereon in their presence; *Held*, that the notes offered in evidence were sufficiently identified as those testified to by the witness.

The code of procedure has modified the general common law rule, that, in an action upon an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action.

In an action against two persons upon a note alleged to have been made by them in 1846, as copartners in their firm name, it was proved that the note was signed by one in the alleged firm name, and that the other defendant was then his wife; *Held*, that the plaintiff could recover against the husband alone.

THE action was brought against William L. James and Eliza Eaglesum. The complaint alleged that the defendants, under and by their copartnership name of Eaglesum & Co., made two promissory notes, particularly described in the complaint, and thereby promised to pay to the plaintiff or order the sums mentioned in them respectively. The notes were dated Toronto, Canada, August first, 1846.

The defendant Eliza did not appear or answer. The defendant James by his answer denied that he, jointly with said Eliza, either under the firm name of Eaglesum & Co. or otherwise made the notes, or that he ever jointly with her either under

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said firm name or otherwise, made the promises in the complaint alleged.

The cause was tried at the Erie county circuit, before Mr. Justice Hoyt. The plaintiff proved by the deputy clerk of Erie county that he took the commission, with the depositions annexed shown him, from the post office at Buffalo; that it was enclosed in a wrapper post marked at Toronto, Canada, and directed to Wells Brooks, Esq., county clerk of Erie county, Buffalo.

The said commission was issued in the cause by the supreme court, directed to two commissioners residing at Toronto, directing them to take the testimony of Clarkson and Lee. Indorsed on the back of the commission was a direction made by Justice Sill at the time it was issued, as follows: "This commission when executed is to be enclosed in a wrapper and deposited in the post office at Toronto by the commissioners, directed to Wells Brooks, Esq., clerk of Erie county, Buffalo, New-York, and a certificate *thereof* indorsed upon the wrapper across the seals of the same by the commissioners. S. E. Sill, J. S." When produced, the commission was inclosed in a wrapper under the seals of the commissioners and addressed as directed, and across the seals on the back of the wrapper was a certificate signed by the commissioners, as follows: "We certify that within is contained the commission, interrogatories, exhibits, depositions and the examinations taken before us in a certain suit, wherein Thomas Brumskill is plaintiff, and William L. James, joined in this action with Eliza Eaglesum, is defendant." The counsel for the plaintiff offered to read in evidence the said commission and depositions annexed; the same were objected to, on the ground that the certificate of the commissioners indorsed upon the wrapper was not in compliance with the directions made by Justice Sill as to the return, in this—that it did not appear that it was deposited in any post office by the commissioners. The objection was overruled and the depositions admitted as evidence, and the counsel for the defendant excepted.

In and by the deposition of Clark, annexed to the commission, he testified that the defendants carried on business at To-

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*Brumskill against James.*

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ronto, under the name of Eaglesum & Co., from 1845 to 1847; that the signature of Eaglesum & Co. to each of the notes described in the interrogatories and then shown him, one of which notes is marked A, and the witness then described this note in the deposition, by date, amount, &c., and added, "and on which note I have written my name, and the other of which notes is marked B, and is dated," &c., and "on which last mentioned note I have also written my name," is in the handwriting of the defendant James. In the deposition of Lee, the other witness, he testified, "the signature of Eaglesum & Co. to each of the notes described in the testimony of the witness Clark, which are marked A and B and are now shown me, and upon each of which I have written my name, is in the handwriting of defendant James, and he was a member of the firm of Eaglesum & Co. at the date of said notes." The return of the commissioners, among other things, stated, "that the witnesses, Clark and Lee, testified as above written; that such testimony was subscribed by the witnesses, who also in the presence of the commissioners, signed their names on the back of the notes attached to their testimony, which notes were produced and shown to them." The counsel for the plaintiff offered to read in evidence two notes described in the complaint which were attached by wafers to the depositions annexed to and returned with the commission, one of which was marked A and the other B, and upon the back of each was indorsed the names of the witnesses Clark and Lee and the two commissioners. The counsel for the defendant objected to their being read, on the ground that there was no sufficient proof that they were the same notes testified to by the witnesses as signed in the handwriting of the defendant James; that the return of the commissioners should have distinctly stated that the notes produced on the examination and sworn to by the witnesses were annexed to and returned with the commission, as a part of the evidence taken by virtue thereof. The objection was overruled and the notes read in evidence, and the counsel for the defendants excepted.

After the plaintiff rested, the counsel for the defendant gave



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evidence tending to prove that the said firm of Eaglesum & Co. was composed of the defendant James alone, and that the defendants at the time the notes were made were husband and wife.

The counsel for the defendant requested the court to charge the jury, that if they found that at the time the notes were made the defendants were husband and wife, they should render a verdict in favor of the defendants. The court refused so to charge, and charged the jury that if they found that the notes were signed by defendant James in the name of Eaglesum & Co., and that defendants were at that time husband and wife, the action could not be sustained against the wife; but that where an action is brought against two persons, and it turns out that only one was ever liable, the judgment may be against the one so liable; and that therefore, in this case, if they should find that the defendants were husband and wife at the time the notes were made, and that the defendant James made them in the name of Eaglesum & Co., their verdict should be in favor of the plaintiff against James alone for the amount of the notes.

To which refusal to charge as requested, and to said charge and every part thereof, as given, the counsel for the defendant James excepted in due form. A verdict was rendered against the defendant James alone for \$573.96, the amount of the notes. The defendant made a bill of exceptions, and the judgment rendered upon the verdict having been affirmed at a general term of the supreme court in the eighth district, he appealed to this court.

*H. S. Cutting*, for the appellant, insisted upon the following, among other points: I. The court erred in refusing to charge the jury, as requested by the defendants' counsel, that if they were satisfied that, at the time of the making of the notes upon which this action is brought, the defendants were husband and wife, their verdict must be for the defendants. 1. The code has not changed the rule of the common law in relation to the misjoinder of parties defendant, and its effect upon the judgment to be rendered in an action. (*Code of 1851, § 274, and opinion*

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of Mr. Justice Willard, cited in the note to that section *Voorhies* 1st ed. of the Code, p. 229; *Corning & Horner v. Shepard*, 3 Pr. R. 19; *Fullerton v. Taylor and others*, 6 id. 259; *Crandall v. Beach*, 7 id. 271; *Merrifield v. Cooley*, 4 id. 272; *Laforge v. Chilson*, 3 Sand. 752.)

The section above referred to provides that a judgment may be rendered, in the discretion of the court, against one or more of several defendants, *whenever a several judgment may be proper*. But as the code does not furnish any rule as to the cases in which such judgment may be proper, it must be held to refer to the previously existing practice.

Mr. Justice Marvin in his opinion in this case concedes, that under the rule as it existed previous to the code, the refusal of the judge at the circuit to charge as requested would have been improper; but assumes, in the conclusion at which he arrives, that that rule had been changed by the code, and relies upon the language of the commissioners, cited from their report, and the case of *Ladue v. Van Vechten*, (8 Barb. 664.)

As to the language of the commissioners, it is no part of the action of the legislature. If it were, it can have no application to this case, except to show that a several judgment, instead of preventing, would cause a failure of justice. It may be here assumed that the defendant James had a set-off against the plaintiff; but as two defendants were joined in the action, whether properly or improperly, he could not avail himself of such set off, (2 R. S. 354, § 18,) but would be remitted to his separate action, and would be compelled to take the risk of the continued solvency of the plaintiff. The case of *Ladue v. Van Vechten*, if it were good law, (and it is submitted that it is not, 4 Hill, 87,) does not, as is supposed, decide this case. Here, the defendants were sued as joint contractors. There, the contract was *joint and several*; and the decision was based expressly upon the ground that the defendants might be made severally liable.

2. The defendants were sued as parties to a joint contract, as appears by the complaint. But if they were husband and wife, one of them never was a party to such contract, and could not

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be made liable. There was, therefore, a misjoinder, and the court should have instructed the jury to render their verdict for the defendants. (1 *Chit. Pl.* 44, 8th *Am. ed.*; *Id.* 59, *citing a case from Palmer*, 312; *Weall v. King*, 12 *East*, 452; *Bull. N. P.* 129; *Max v. Roberts*, 5 *Bos. & Pul.* (2 *N. R.*) 454; 1 *Saunders*, 207 *a*, *note*; *Cooper v. Whitehouse*, 2 *Car. & P.* 545, (*R. C. L.* 25, 585; ) *Siffkin v. Walker*, 2 *Camp.* 308; *Elmendorf v. Tappan*, 5 *John.* 176; *Livingston's Ex'rs v. Tremper*, 11 *id.* 101; *Robertson v. Smith*, 18 *id.* 478; *Mannahan v. Gibbons*, 19 *id.* 109; *Platner v. Johnson*, 3 *Hill*, 476; *Miller v. McCagg*, 4 *Hill*, 36.) The rule established by the above authorities is, that if too many persons be made defendants, and it does not appear upon the face of the pleadings, the plaintiff may be *nonsuited* on the trial if he fail in proving a joint contract, or the verdict must be for the defendant. (2 *N. R.* 457.) Nor can it make any difference, in the application of the rule to this case, that the defendant James pleaded separately, and a default was taken against the other defendant. (19 *Wend.* 643; 4 *Hill*, 35.)

*N. Hill, Jr.* for the respondent, insisted upon the following, among other points: I. There was no joint liability of the defendants. The defendant Eliza Eaglesum had a personal defense to the action, and never was liable. (*Fullerton v. Taylor and others*, 6 *How. Pr. R.* 259, No. 7, March, 1852.)

II. A several judgment in this action was proper, because the plaintiff would have been entitled to a judgment against the defendant James, if the action had been against him alone. (*Code of 1851*, § 136; *Id.* § 274; § 136, *sub. 3*; *The President &c. of Mechanics' Bank of Albany v. Rider and Wilbur*, 5 *How. Pr. Rep.* 401.)

GARDINER, Ch. J. The first exception relates to the insufficiency of the certificate of the commissioners, in not stating, in pursuance of the direction of the judge who allowed the commis-

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sion, that it was by them deposited in the post office. The direction indorsed on the commission was as follows: "This commission when executed is to be enclosed in a wrapper, and deposited in the post office by the commissioners at the city of Toronto, directed to Wells Brooks, Esq., county clerk of the county of Erie, Buffalo, Erie county, New-York, and a certificate **THEREOF** indorsed upon the wrapper across the seals of the same by the commissioners." The meaning of the direction is plain. The word "thereof" refers at most to those acts by the commissioners, to which they could certify before parting with the commission. It cannot be construed as including a deposit of the papers in the post office at Toronto, without the absurdity of supposing that the judge intended that the commissioners should certify to an act done by them, before its performance. Such a certificate would carry a falsehood upon its face. Every one would know that it could not have been made *after* the deposit; for the commission would then be in the custody of the post office department. And the receipt of the documents through the mail, would be stronger evidence that the endorsement was made before the deposit, than the most precise and unscrupulous certificate could be of the contrary. The direction, if understood as the defendant insists it should be, would be void. There is nothing in the statute requiring it. And no judge, under color of directing the manner in which a commission should be returned, can deprive a party of the benefit of the statute, unless he can procure a commissioner who will certify to a falsehood. The objection was properly overruled.

The next exception was to the decision of the judge in allowing the notes annexed to the commission to be read in evidence. The objection was, that there was no sufficient evidence that they were the *same* notes, proved by the witnesses examined by the commissioners. The notes were respectively marked A and B. They were referred to by the witnesses as being thus marked; a copy of each was also given, with a statement, that the witnesses had written their names upon each note. All this appeared in the depositions.

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The commissioners then certify, that the witnesses testified as *above written*, that they subscribed their names on the back of the notes attached to such answers, which were produced and shown to them. The notes offered in evidence corresponded with the description given, in every particular, and were indorsed with the names of the commissioners in pursuance of the statute. (2 R. S. 394, § 16, *sub.* 3.) This is all that is necessary to identify the papers. The question indeed was not very confidently argued by the counsel for the defendants, and was properly disposed of upon the trial.

The defendants' counsel requested the judge to instruct the jury, "that if they were satisfied that, at the time of making the notes upon which the action was brought, the defendants were *husband and wife*, their verdict must be for the defendants." This was refused; and the judge charged, that under the circumstances they might find a verdict against the husband alone. To this refusal, the defendants excepted. Whatever may have been the rule at common law, when husband and wife were joined in an action upon contract, made during coverture, there is no doubt that the ruling of the judge is sustained by the provisions of the code of procedure. The 274th section provides, that judgment may be given for, or against, one or more of several defendants; and by the third subdivision of the 136th section, if all the defendants have been served with process, judgment may be taken against any, or either of them severally, when the plaintiff would be entitled to such judgment, if the action had been against them, or any of them alone. The defendant admits that James, the husband, would have been liable if he had been the only defendant, as he obviously would, since the contract counted upon was in law his, exclusively. He relies upon the misjoinder, and upon the general rule of the common law, that where a joint contract is the subject of the suit, the recovery must be against all the defendants, or neither. This was the inconvenience the above provisions of the code were designed to remedy, and no case is likely to be presented, in

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which their application would be more manifestly equitable and just than the present.

The judgment of the supreme court should be affirmed.

DENIO, JOHNSON, ALLEN, EDWARDS and PARKER, Js., concurred in the foregoing opinion. SELDEN, J., dissented on the question last discussed.

Judgment affirmed.

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KELLOGG and others *against* SLAUSON and others.

An assignment by an insolvent debtor of his property to trustees for the benefit of his creditors, which expressly authorizes them to sell the property *upon credit*, is void as against the creditors of the assignor.

But an assignment will not be construed as conferring this authority, where its language is consistent with a different interpretation which makes it legal and valid.

Accordingly, where the assignment authorized the trustees to take possession of the property and sell and dispose of the same *upon such terms and conditions* as in their judgment might appear best, and *most* for the *interests* of the *parties concerned*, and convert the same into money; *Held*, that it was valid.

APPEAL from a judgment of the supreme court sitting in the fifth district.

The complaint alleged that in February, 1851, at Denmark, Lewis county, the defendants unlawfully took and converted goods, wares and merchandise belonging to the plaintiffs, of the value of \$700. The answer denied that the property belonged to the plaintiffs, and alleged that their only claim of title to it was by virtue and color of an assignment of the property made to them by one Backus, in November, 1850, professedly for the benefit of his creditors; and that such assignment was made by Backus without consideration, for the purpose and with the intent of hindering, delaying and defrauding his creditors. The

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answer further alleged that the defendants were creditors of Backus at the time the assignment was made; that they recovered judgment upon their debt in January, 1851, upon which an execution was issued to the sheriff of Lewis county and the property seized and sold thereon, the same then being the property of Backus and not of the plaintiffs, which were the same taking and converting alleged in the complaint. The plaintiffs by reply denied the allegations of new matter.

The cause was tried before Mr. Justice Allen, in September, 1851, at the Jefferson county circuit. The taking of the property by the defendants, by virtue of the execution mentioned in the answer, was admitted; it was also admitted that Backus was in possession of the same up to the 1st of November, 1850. The plaintiffs read in evidence an instrument dated November 1st, 1850, executed by Backus to the plaintiffs, in which it was recited that he was indebted in sundry considerable amounts, and had become unable to pay the same with punctuality or in full, and by which he sold, assigned and conveyed all his property to the plaintiffs in trust, and to and for the use and purpose that the plaintiffs should "take possession of all and singular the property and effects thereby assigned, and sell and dispose of the same *upon such terms and conditions as in their judgment may appear best and most for the interest of the parties concerned*, and convert the same into money," and with the avails and proceeds pay all his debts with certain preferences therein specified, and return the surplus, if any there should be, to him. Further evidence was given by the respective parties, but none affecting the questions arising on the bill of exceptions.

At the close of the trial the counsel for the defendants, among other points, made the following, and requested the court to rule and decide, 1. That the assignment is fraudulent and void on its face, by reason of its giving power to the assignees to deal with the assigned property in their discretion; that the clause authorizing them to sell and dispose of the same upon such terms and conditions as in their judgment may appear best and most for the interest of the parties concerned, gave the assignees an un-

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lawful discretion over the property—authorized them to sell upon credit or any terms whatever, or at any time to suit the convenience and wishes and for the benefit of the assignor; 2. That the assignment is void, for the reason that it did not appear on its face or otherwise that the assignor was insolvent, or had any legal cause, ground or reason for making it; that the case called for such explanation and it devolved upon the plaintiffs to give it, and that in its absence the assignment should be deemed in law fraudulent.

The court refused so to rule or charge the jury as matter of law, and the counsel for the defendants excepted. The questions of fraud or fraudulent intent arising in the case were submitted to the jury as questions of fact, with directions as to the law. A verdict was rendered in favor of the plaintiffs for the value of the property taken. A bill of exceptions was made by the defendants and judgment rendered upon the verdict, which was affirmed at general term; the defendants appealed to this court.

*T. H. Rodman*, for the appellants.

*N. Hill, Jr.*, for the respondents.

PARKER, J. The question is not raised in this case, whether the solvency of Backus at the time of the assignment would render the assignment void. The burthen of proving that fact, or any other on which the defendant depended to show the assignment to be fraudulent, rested upon the defendant, who relied solely upon the recital in the assignment. (10 *Paige*, 302.) But the recital, even if it were evidence as between these parties, falls far short of showing the solvency of the assignor. It seems rather to intimate his insolvency. After reciting that he is justly indebted in sundry considerable sums of money, it adds that he has become unable to pay and discharge the same with punctuality or in full, and expresses his desire to make a fair and equitable distribution of his property and effects among his



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creditors. These expressions are inconsistent with the idea of solvency.

But the principal ground relied upon to avoid this assignment is that it authorizes a sale on credit, and falls within the decision in *Barney v. Griffin*, (2 Comst. 365,) and *Nicholson v. Leavitt*, (2 Seld. 510.) In these cases the assignments authorized sales upon credit in express terms. In this case, the assignees were authorized to sell and dispose of the property "*upon such terms and conditions* as in their judgment might appear best and most for the interests of the *parties concerned*, and convert the same into money," &c. It is claimed that this authority is broad enough to cover a sale on credit.

It is certain that the "terms and conditions" on which the property is to be disposed of, are left entirely to the discretion of the assignees. But that discretion is to be exercised within legal limits. The law implies a restriction not inserted in express words. It will not defeat the instrument, by inferring that the assignor contemplated an illegal act. There is no express authority given in the assignment to sell on credit or do any other illegal act, and there is ample room, within legal limits, for the exercise of the discretion conferred. The assignees were at liberty to sell at public or private sale—in large or small quantities—or one article, with the privilege of taking more of the same kind at the same price. They might require a certain percentage to be paid at the time of the bid and the balance on delivery, and might prescribe the time and place for delivery in gross or in parcels. The language of the assignment can be abundantly satisfied by a construction that shall support the instrument, and, in such case, the rule is well settled that a construction shall not be given which shall defeat it.

If the general authority given in the assignment is to be regarded as contemplating and authorizing a sale on credit, it authorizes equally any and every other illegal act; such as disposing of it by lottery, or at a raffle; making the sale a cover

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for usury ; agreeing with the assignee himself to keep possession and dispose of it for his own benefit, &c. All these illegal things might be done under the broad authority to sell and dispose of the property on such terms and conditions as in the judgment of the assignees might appear best, and a design to do them may with as much propriety be imputed to the parties to the assignment as a design to sell on credit.

In an agreement between A. and B., that the latter shall loan for the former the sum of ten thousand dollars, on such terms and conditions as he shall deem best for the interests of A., the language is broad enough to authorize an usurious loan ; but the law would not construe it as covering such an authority, and would not hold it void, as being an agreement to do an illegal act. It is only when the authority is express to do an illegal act, that the instrument will be held void. Where the authority is general, it will be deemed to be, and to have been intended to be, within the limits prescribed by law.

In *Meacham v. Sternes*, (9 *Paige*, 398,) where, in an assignment in trust, the assignor directed the trustee to sell the property "in such manner and at such reasonable times as should seem proper to him," it was held that he was not authorized to sell at retail and on credit, nor to send it to agents to be sold on commission. General as was the power conferred, it was held not to extend to, and that it would not protect the assignee in doing, the illegal acts mentioned. In *Hitchcock v. Cadmus*, (2 *Barb. S. C. R.* 381,) the assignees were authorized "to *manage* and *improve*" the assigned property, and it was held that such provision did not render it invalid ; but that these words should be satisfied by a construction, which would not empower the assignees to retain the assigned property for the purpose of erecting buildings, and making alterations and repairs on the real estate, and thus to hinder and delay creditors from collecting their just debts. In *Whitney v. Krows*, (11 *Barb.* 198,) the assignment contained the same authority in precisely the same language as in the case now under consideration ; and it was held

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by Harris, J., that it should not be construed as authorizing them to sell on credit. The same construction was put upon the same language by Edwards, J., in *Southworth v. Sheldon*, (7 How. Pr. R. 414.) In *Bellows v. Patridge*, recently decided by Roosevelt, J., and not reported, the assignment authorized the assignee, "as soon as reasonably practicable with due regard to the rightful interests of all the parties concerned, to convert into money by sales, either public or private, or by collection, as the case might require, or as might in the judgment of T. F. (the assignee) be for the best advantage, all the said real and personal property, &c., and to apply the proceeds, &c., as directed in the assignment." It was objected that this was void, as authorizing a sale on credit. But the court held that no such illegal intent would be implied. A case has recently been decided at general term by the supreme court, sitting in the third district, (*Mann v. Whitlock*,) which is not yet reported, in which the assignee was authorized "to employ suitable agents at a reasonable compensation, &c., and generally to adopt such measures in relation to the settlement of the estate as would, in his judgment, promote the true interests thereof." It was held that this general authority did not authorize a sale on credit, and that the assignment was valid. In the cases of *Woodburn v. Mosher*, (9 Barb. S. C. R. 255,) and *Murphy v. Bell*, (8 How. Pr. R. 468,) there was a provision that the assignees should convert the assigned estate into money "within such convenient time as to them should seem meet," and it was held that it was an authority to sell on credit. A specific provision, giving "convenient time," distinguishes those cases from the one under consideration.

I have learned of no case in which the assignment has been held invalid on the ground now taken; but so far as opinions have been expressed by the courts, I believe they agree generally in the view I have taken. The clause in question has long been in use in this state, and will be found in the established precedents. (*Ang. on Assignments*, 209, 215.) I believe it was never questioned till since the decision in *Barney v. Griffin*.

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*Rexford against Knight.*

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I think the assignment was valid, and that the judgment of the supreme court should be affirmed.

JOHNSON, J., delivered an opinion to the same effect.

GARDINER, Ch. J., and DENIO, SELDEN, ALLEN and EDWARDS, Js., concurred.

Judgment affirmed.

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REXFORD and others *against* KNIGHT.

The legislature had authority to pass the law (1 R. S. 226, § 49,) enacting that where premises had been appropriated to the use of a canal, no claim for damages therefor should be received by the appraisers, or paid, unless exhibited within a year after the law took effect, and that such premises should be deemed the property of the state.

This law does not conflict with the constitution of the United States. Nor did it violate the provision of the constitution of this state, forbidding the taking of private property for public use without just compensation.

The title to premises which were appropriated to the use of the state canals, at the time this law took effect, is in the state. The state acquired an estate in fee in such premises.

Upon an abandonment of their use for the purposes of a canal, the premises do not revert to the former owner; title to the same continues in the state.

THE action was to recover the possession of a small parcel of land situate in Clifton Park, Saratoga county. The plaintiffs, by the complaint, claimed title as the widow and heirs of Eleazer Rexford the younger. The defendant, by his answer, denied that the plaintiffs had title, and alleged that he was in the lawful possession of the premises.

The cause was tried before Justice Paige, at the Saratoga circuit, in October, 1850, when the plaintiffs were nonsuited, with leave to them to make a case, and apply to the supreme court at general term thereon for a new trial. The cause was

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*Rexford against Knight.*

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heard upon the case made, at a general term in the fourth district, and a new trial denied, and judgment ordered in favor of the defendant upon the nonsuit granted at the circuit. (*See 15 Barb. S. C. R. 627.*) The case was turned into a bill of exceptions, and inserted in the record. Several of the questions which were discussed upon the case before the supreme court were not before this court.

From the bill of exceptions it appeared that the plaintiffs, on the trial, proved that the land in question was parcel of a farm owned by Eleazer Rexford the elder, who died intestate in 1819, leaving a son, Eleazer Rexford the younger, and other children; that between the years 1819 and 1825, the other children conveyed all their interest in this farm to Eleazer Rexford the younger, who died in 1829, leaving the plaintiffs his widow and heirs at law. After the plaintiffs rested, the defendant produced what purported to be maps of a portion of the Erie canal as originally constructed, and of the same portion as enlarged, upon which maps the premises in controversy were designated. These maps were not in any way authenticated, as the original, or copies of any maps made by statute evidence, and their use on the trial was objected to, except for the purpose of designating the locality of the premises in dispute; and it did not appear that they were received or used with any other view. The defendant proved by other evidence, that the premises sought to be recovered were actually occupied by and used as a part of the Erie canal, as originally staked out and constructed, prior to the year 1825, and that this occupation and use continued from that time until the enlarged canal was constructed. That in making the enlarged canal, its location at this point was changed, and that since this period the premises had been used and occupied by the defendant. There was some evidence tending to prove that Eleazer Rexford the younger, in 1822 and 1823, claimed damages of the state for the appropriation of these premises for the original canal, but no sufficient evidence that such damages had been appraised or paid. The defendant also proved that in September, 1826, Eleazer Rexford the younger conveyed to

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one Curtiss two lots of land, the one on the east and the other on the west side of the canal as then located and of the premises now in dispute, the canal being designated in the deed as a boundary of each lot. The defendant derived title to one of these lots from Curtiss.

At the close of the trial, the counsel for the defendant moved the court to nonsuit the plaintiff on the following grounds: (1.) That the premises in question belonged to the state if they did not belong to the defendant; (2.) That if the right of the state thereto had ceased, the land reverted to the defendant as a grantee deriving title from Rexford. The court granted said motion and nonsuited the plaintiff, and the counsel for the plaintiff excepted. From the judgment of nonsuit entered in favor of the defendant the plaintiffs appealed to this court.

*P. Potter*, for the appellants, submitted in substance the points and arguments presented by him on the part of the appellants to the supreme court, which will be found at length in 15 *Barbour's Sup. Court Reports*, 632.

*N. Hill, Jr.*, for the respondent, submitted the following points, with others. *First.* The title of the state does not depend upon whether Rexford succeeded in getting pay for the land, in money or otherwise. It is enough that a mode was provided by which he could have his claim for damages, if any, ascertained and enforced. (*Laws of 1817*, p. 202, 203, § 3; *Id. of 1821*, p. 248, § 1; *Id. of 1825*, p. 398, 9, §§ 1, 2; 1 *R. S.* 226, § 49.) 1. This remedy has always been deemed a compliance with the constitutional requisition as to just compensation. (6 *Hill*, 359, 361; 18 *Wend.* 9, 17, 18, 27, 28; 14 *id.* 56; 10 *id.* 666; 6 *id.* 634; 4 *id.* 667; 7 *Barb.* 426; 2 *Dev. & Batt.* 451; 1 *Smith, (Ind.)* 83.) 2. If the title depended on an appraisement, the plaintiffs renounced this condition by omitting to apply in time, and thus consented that the state should become owner absolutely. (1 *R. S.* 226, § 49; *Id.* 777, § 5, *subd.* 3; 3 *Comstock*, 511.)

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*Second.* By the permanent appropriation of the land as a part of the canal, the state acquired an absolute title in fee, and there is no pretense for saying that it has reverted. 1. The statute clearly meant that the entire estate of the owner should be acquired by the appropriation; not an estate depending on contingencies, nor an easement. (*Laws of 1817*, p. 303, § 3; 1 *R. S.* 218, § 4; *Id.* 226, § 49; 7 *John. Ch. R.* 343, 4.) 2. The permanent nature of the object in view required an absolute estate in fee, and the owner was to be compensated accordingly. (*See* 2 *Watts*, 198; 6 *Hill*, 361, 2; *Const. of N. Y.* 1821, art. 7, § 10; *Const. of 1846*, art. 7, § 6.) 3. The title thus acquired did not revert merely because the land ceased to be used as part of the actual structure of the canal. (2 *Paige*, 184; *Hayward v. Mayor*, &c. 8 *N. Y. Leg. Obs.* 244, 247; *see S. C. in court of appeals*, 3 *Selden*, 314; *Watts*, 195, 6.)

JOHNSON, J. The plaintiffs are right in the position that the maps which were given in evidence by the defendants, of those parts of the Erie canal as originally constructed and as subsequently enlarged, that include the premises in question, do not upon the bill of exceptions appear either to be or to be copies of the maps mentioned in chapter 451, § 6, of the laws of 1837. They therefore did not of themselves afford presumptive evidence, that the lands thereon indicated to belong to the state had been taken and appropriated by the state for the canals. Nor does enough appear upon the bill of exceptions to enable us to say that they were offered as being such maps, although the form of the objection taken to them would incline us to think that may have been the case. If in fact they were maps to which by law the character of presumptive evidence was attached, the defendant has lost the benefit of them by failing to get into the bill of exceptions a clear disclosure of their character.

It remains to be considered whether, without the benefit of the presumption which might have arisen from authenticated copies of the state maps, the defendant has succeeded in making out a defense.

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It is established by the evidence disclosed in the bill of exceptions, that the premises demanded by the plaintiff were actually occupied by the canal as originally constructed, and at least as early as 1825. They continued to be so occupied until the enlarged canal was constructed. Since that time the defendant has occupied the premises. There is no sufficient evidence of an appraisement of these premises as appropriated for the canal. The unsigned and undated paper found in the office of the canal appraisers, although admitted to relate to the premises in question, is not itself proof of an appraisement, and it is the only attempted proof.

The defendant's case, therefore, depends upon the effect of section 49 of title 9 of chapter 9 of the first part of the revised statutes. That section reads as follows: "No claim for damages for premises that shall have been appropriated for the use of a canal, at any time before this chapter shall be in force, shall be received by the appraisers, unless it shall be exhibited within one year after this chapter shall become a law; and the premises so appropriated shall be deemed the property of the state; and no claims other than those so exhibited shall be paid, without the special direction of the legislature." The chapter in which this section is found was passed December 3d, 1827, and took effect as a law January 1st, 1828.

The mere reading of this section makes it apparent, that premises may be appropriated to the use of a canal within its meaning, before any claim for damages or any appraisement thereof. The appropriation is complete, when the officers of the state have entered upon and taken possession of the land and constructed the canal upon it. (*Baker v. Johnson*, 2 Hill, 342; *People v. Hayden*, 6 id. 359.) The premises demanded were, therefore, both when this section was passed and when it took effect as a law, in the condition to which the language of the section applies. They had been appropriated to the use of a canal, and according to the language of the section claims for damages on account of such appropriation were to be made to the ca-



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nal appraisers within a year, and no others were to be paid without the special direction of the legislature, and the premises so appropriated were to be deemed the property of the state.

If the legislature had the power to pass this law, then the premises were and are in pursuance of its terms to be deemed the property of the state. The act is in substance a statute of limitations applicable to pre-existent demands. In respect to statutes of limitations, the supreme court of the United States say, in *Jackson v. Lamphire*, (3 Peters, 290,) "The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country and the emergency which leads to their enactment. Cases may occur, where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court." The provisions of this act, which allowed a year after its passage for the making of claims, do not come up to the unreasonableness which will render such a law void. To do that, a court must, I think, be able to say, that no substantial opportunity is afforded to the party affected to assert his rights after the passage of the law; that the unmistakable purpose and effect of the law is to cut off the right of the party, and not merely to limit the time in which he may begin to enforce it. Viewed as a statute of limitations, the act in question, therefore, does not violate the provision of the constitution of the United States, forbidding the states to pass any law impairing the obligation of contracts.

Nor does it violate the provision of the constitution of this state, of 1821, which forbids the taking of private property for public use without just compensation. *The People v. Hayden* and *Baker v. Johnson*, before cited, as well as *Bloodgood v. The Mohawk and Hudson Railroad Co.*, (18 Wend. 9,) affirm the position that where private property is taken by the state for

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public use, it is sufficient that a certain and adequate remedy should be provided, by which the individual can obtain compensation without any unreasonable delay. Such a remedy was provided by the acts of 1817 and 1819 in respect to the construction of the canals. The construction upon those acts has been, that the fee did not vest in the state until the payment of the compensation, although the authority to enter upon and appropriate the land was complete, prior to payment. If the officers whose duty it was to procure an appraisement did not proceed to perform that duty, the remedy by mandamus, to get them in motion, was adequate and complete. By force of those acts, the entry upon, and appropriation of the premises in question for the canal, were lawful, even though the fee did not pass, by reason of the non-appraisement of the damages and their consequent non-payment.

When § 49, before referred to, was passed, the condition of the property was that the state had appropriated it lawfully for a canal, but the fee had not passed, compensation not having been made. That section declared that premises so situated should be deemed the property of the state, giving to the party his remedy to obtain payment therefor, but requiring that right to be exercised within the period of a year. The state thereby exercised directly its right of eminent domain upon the property so situated, as effectually as if it had then first been taken under the delegated authority of the canal commissioners.

As to the quantity of estate acquired by the state, I entertain no doubt that it is a fee simple. The language employed is so broad as to require a fee simple. The lands are to be deemed the property of the state, and that excludes the idea that any one else is to retain a property in them. That under such a state of the title, the lands would not revert upon the abandonment of their use for the purpose of a canal, and that such a title might be acquired under the right of eminent domain, notwithstanding the possibility that the lands might cease to be used for the purpose for which they were originally taken, was held in *Hayward*

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 Craig *against* Wells.
 

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v. *The Mayor &c. of New-York*, (3 *Selden*, 314.) The nonsuit was therefore right, and the judgment should be affirmed.

EDWARDS, J., delivered an opinion to the same effect.

GARDINER, Ch. J., and DENIO, ALLEN and SELDEN, Js., concurred.

PARKER, J., dissented.

Judgment affirmed.

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 CRAIG and others *against* WELLS.

To authorize several instruments executed at the same time to be construed together as constituting one contract or conveyance, they should be between the same parties. *Per SELDEN, J.*

Conditions in grants are not favored by the law, and hence must be clearly expressed.

No particular words are requisite to create a condition, but they must clearly import, that the vesting or continuance of the estate is to depend upon the supposed contingency.

A reservation is never of a part of the thing granted, but of something issuing or created out of it.

An exception must be of a portion of that which is included by the general description in the grant.

A prohibition of the use of property granted inconsistent with the title conveyed, is void.

A valid restriction of the use of property conveyed may be imposed by a condition upon covenant of the grantee. *Per SELDEN, J.*

M., being the owner of premises situate on both sides of the Walkill, with mills situate thereon propelled by its waters, by separate deeds executed at the same time, conveyed to his son G., in fee, land with a grist mill, &c. thereon, situate on the east side of the stream, and to his son W., in fee, land on the west side, with a fulling mill, &c. thereon: the deed to G. contained a clause *excepting and prohibiting* the right of carrying on upon the premises granted to him, the business of fulling or dressing cloth, &c., and also the right of using the water of the stream for any purpose other than grinding grain, when the same should be necessary or useful to W., his heirs, &c., for the fulling, &c. of cloth

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upon the premises conveyed to him by M., by deed of even date; the deed to W. contained a clause *excepting and prohibiting the right of using the waters of the Walkill for turning any wheel not used or useful in fulling, dyeing or dressing cloth*. Simultaneously with the execution of these deeds, G. and W. executed each to the other his bond, conditioned for the observance of the exceptions and prohibitions contained in his respective deed. Subsequently W. conveyed his premises by deed, containing no restrictions as to the use of the water, and his grantee converted the fulling mill into a grist mill, and used the water of the stream to propel it. On bill, filed by the heirs of G. to restrain him from so using the water, *Held*, 1. That as against the defendant the deeds and bonds were not to be construed together as forming one instrument. 2. That the clause in the deed to W. restricting the use of the water, did not create a condition, exception or reservation. 3. That it could not be construed as a covenant, limiting the use of the property conveyed. 4. That this clause was a mere prohibition of the use of the thing granted, and as such, void.

MOSES PHILLIPS, the grandfather of the plaintiffs, Harriet and Adeline, was the owner of a tract of land, in the town of Walkill, county of Orange, lying upon a stream called the Walkill. Upon these premises were situated, on the east bank of the stream, a grist mill and oil mill; and opposite, upon the west bank, an establishment for the fulling, dyeing and dressing of cloth; all belonging to Moses Phillips, and all supplied with water, by means of a common dam erected across the stream above. In October, 1805, Moses Phillips made a distribution of his property among his children; among whom were Gabriel N. Phillips, the father of the plaintiffs, and Williams Philips, under whom the defendant claims. The premises on the east side of the stream, including the grist mill and oil mill, were, upon that occasion conveyed in fee to Gabriel N., and those upon the west side, including the establishment for the fulling and dressing of cloth, to William. Both deeds were executed at the same time, and bore the same date.

The deed to Gabriel N. contained the following clause, viz: "Excepting and prohibiting the right of establishing or conducting, upon the premises aforesaid, the business of a merchant in buying and selling any goods, wares or merchandise, not the growth or facture of the same, or not usually bought and sold

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in the business of an apothecary ; and also the right of conducting in any manner whatever the business of fulling, dyeing or dressing cloth ; also the right of using the waters of the Walkill for the making of oil, or any other purpose, besides the grinding of grain for country use, when the same shall be necessary or useful to William Phillips, son of the said Moses Phillips, his heirs or assigns, for the fulling, dyeing or dressing of cloth upon the premises, by the said Moses Phillips, and Sarah his wife, conveyed to him, by an indenture bearing even date herewith."

The deed to William contained a corresponding clause, in the following words, viz : " Excepting and prohibiting the right of using the waters of the said Walkill, for the turning of any wheel, not used or useful in fulling, dyeing or dressing cloth, or for turning a grindstone ; and in the latter case, only when the said waters shall be unnecessary for the making of oil, or grinding of grain ; also the right of establishing or conducting upon the premises aforesaid, the business of a merchant in buying and selling goods, wares or merchandise, not the growth or facture of the same." These deeds were given partly in consideration of natural love and affection, and partly for a pecuniary consideration.

Simultaneously with the execution of the deeds, the grantees, Gabriel N. and William, executed their respective bonds, each to the other, in the penalty of five thousand dollars, conditioned for the faithful observance by them of the exceptions and prohibitions contained in their respective deeds. The bond of William to Gabriel N. was not produced upon the trial. That of Gabriel N. to William was produced by the plaintiffs. The condition of this bond, after reciting the respective conveyances and their object, was as follows : " And whereas, the value of the said premises, so conveyed to the said William Phillips, depends much on the said establishment *continuing unrivalled* ; and whereas, it being a matter of understanding and agreement between the said Moses Phillips and his said sons, that of them alone the said William Phillips, his heirs

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and assigns should conduct the business of fulling, dyeing and dressing cloth, the said Moses did, in the conveyance to the said Gabriel N. Phillips, prohibit the right of conducting upon the premises conveyed the business of fulling, dyeing and dressing cloth: also the right of using the waters of the Walkill so conveyed for the making of oil, or any other purpose besides the grinding of grain for country use, when the same would be useful, or necessary to him, the said William Phillips, for the said business of fulling, dyeing and dressing cloth. Now, therefore, the condition of this obligation is such, that if the above bounden Gabriel N. Phillips, his heirs and assigns, shall abstain from conducting upon the premises aforesaid the business of fulling, dyeing and dressing cloth, and also from the use of the waters of the said Walkill, in conformity with the said prohibition, then this obligation to be void; otherwise to be and remain in full force and virtue."

Moses Phillips afterwards made his will, by which, after certain specific bequests, he devised one fifth part of the residue of his estate to Gabriel N. Phillips, and the remainder equally to his four other children. Gabriel N. died in March, 1849, leaving the plaintiffs, Harriet Craig and Adeline L. Phillips, his only children and heirs at law.

In July, 1844, William Phillips together with his wife conveyed, by deed, the portion of the premises so conveyed to him by his father, upon which the establishment for fulling and dressing cloth was situated, to his two sons, William N. and Thomas L., in fee. This deed was absolute and unconditional, and contained no restriction whatever upon the use to be made of the waters of the Walkill. In September, 1844, William N. and Thomas L. Phillips executed to the defendant a mortgage upon the premises so conveyed to them, to secure the payment of the sum of \$1500. This mortgage was afterwards foreclosed, and the defendant became the purchaser of the premises at the mortgage sale, and received from the sheriff a deed therefor. Neither the mortgage nor the sheriff's deed contained, or alluded to, any restriction in the use of the waters flowing upon the premises.

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*Craig against Wells.*

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After the conveyance by the sheriff, and before the commencement of this suit, the defendant converted the cloth dressing establishment into a grist mill, and used the waters of the Walkill for the purpose of operating it; and this suit was brought to restrain him from such use of the waters, upon the ground that it was a violation of the exception or prohibition contained in the deed from Moses to William Phillips. The complaint alleges that from the time of the conveyance by Moses Phillips to him, until his death, Gabriel N. claimed and exercised *the sole and exclusive right* of using the waters of the Walkill, upon the premises so conveyed to him by Moses Phillips, for the grinding of grain. This allegation is denied: but the answer admits that there had been a grist mill upon the premises conveyed to Gabriel, from the date of such conveyance to the time of the answer, which had been during most of the time in operation. There had been no grist mill upon the west side of the stream, until the defendant changed the cloth dressing establishment into one.

Upon this state of facts, the supreme court, at special term, gave judgment for the plaintiffs, and granted the relief sought by them. On appeal to the general term in the second district this judgment was reversed, and judgment rendered in favor of the defendant. From this judgment the plaintiffs appealed to this court.

*J. S. Wilkin*, for the appellants.

*William Fullerton*, for the respondent.

SELDEN, J. It is insisted, on the part of the plaintiffs, that the deeds from Moses Phillips to his two sons, Gabriel N. and William, and the mutual bonds of the latter, having all been executed at the same time, and designed to carry out a specific object, should all be construed together, as parts of a single transaction. But the rule, by virtue of which separate written instruments, bearing the same date and relating to the same subject matter, are sometimes united, and construed as a single instru-

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ment, has never been, and cannot with propriety be, extended to such a case. It is not sufficient that the date of the instruments and the subject matter are the same. There must also, for obvious reasons, be an identity of parties. This is in accordance with the rule as laid down in the cases. In *Cornell v. Todd*, (2 *Denio*, 130,) Judge Bronson says, "It is undoubtedly true, that several deeds or other writings, executed *between the same parties*, at the same time, and relating to the same subject matter, and so constituting parts of one transaction, should be read and construed together, as forming parts of one assurance or agreement." In that case, although the parties to the deeds were the same, and they bore date on the same day, the court refused to construe them as one instrument, merely because they conveyed different parcels of land. The reasons against uniting the instruments, in this case, are much stronger than in that. The fact that the parties are different is an insuperable objection. As the provisions of all the instruments where the rule is adopted, are to be incorporated into one, of course, only those who have executed *all* the parts, can be held to have executed the complex whole.

The deed, therefore, from Moses Phillips to his son William, upon which the questions in this case arise, is to be construed by itself: although the circumstances under which it was executed, and among them the simultaneous execution of the other deed and bonds, may no doubt be resorted to, for the purpose of aiding in its construction, so far as there may seem to be any thing equivocal in its provisions.

What then is the nature of the clause in that deed which contains the exception or prohibition relied upon by the plaintiffs; and what is its legal force and effect? It is clear that the clause does not create a condition. Conditions are not favored by the law; and hence they must be clearly expressed. It is true, that no precise form of words is necessary to create them. The words, *upon condition*; *provided*; and *if*; *so that*; or other equivalent words, will be sufficient. But there must be some words, which, *ex vi termini*, import that the vesting or continu-



ance of the estate is to depend upon the supposed condition. There are, in this case, no words which can receive such a construction, or which in the most remote degree indicate such an intent.

Unless, therefore, the clause in question is obligatory upon the grantee as a covenant, which I will consider hereafter, it must have force and effect, if at all, as an exception or reservation. Although these terms are frequently used as substantially synonymous, yet they are in reality different; and some notice of the distinction between them is essential to a clear analysis of the present case. Perhaps the difference cannot be better stated than in the words of Shepard. He says: "A reservation is a clause in a deed, whereby the grantor doth reserve some *new thing* to himself out of that which he granted before. This doth differ from an exception, which is ever part of the thing granted, and of a thing in esse at the time: but this is of a thing newly created, or reserved out of a thing demised, that was not in esse before." (*Shep. Touch.* 80.) It will be seen, therefore, that a reservation is always of something taken back out of that which is clearly granted; while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it, as for instance, rent, or some right to be exercised in relation to the estate; as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted, or described as granted, and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted. (*Shep. Touch.* 77, 78; *Cunningham v. Knight*, 1 Barb. S. C. Rep. 399; *Starr v. Child*, 5 Denio, 599.)

In view of this distinction, it is plain that there is in this case no reservation. No new interest or right is created or reserved to the grantor, or to any other person, out of or springing from the estate granted. The most which can be claimed is that the right exercised by the defendant, of using the waters of the Walkill for operating a grist mill, was

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*Craig against Wells.*

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never conveyed to William Phillips, but was excepted out of the grant to him. Does the clause in question, then, create a valid exception? It is, as we have seen, essential to every good exception, that the thing excepted be a part of the thing granted, that is, of that which is included in the general description contained in the grant. But here is no exception of *any part of the estate*. The whole is conveyed, including the right to use *all* the water flowing over the land granted, provided it be used in a certain way, viz. in the fulling, dyeing and dressing of cloth. The object in inserting the clause in question *was*, not to except out of the grant any portion of the water flowing in the western half of the stream, but to prevent competition in the business of grinding grain. This is apparent, from the clause itself, but is rendered still more evident by reference to the terms of the bond.

This is very different from an exception. It is a mere limitation of the use which the grantee shall make of the thing granted—a naked prohibition. No right to the use of the water is saved to the grantor. This prohibition is inconsistent with the title conveyed by the deed, and is clearly void. If one conveys land in fee simple, and neither excepts any part nor reserves anything to himself out of it but restricts the grantee to a particular use of the land, this restriction is void, as repugnant to the proprietary rights of an owner in fee. Such a restriction may be imposed, and would be good as a condition or a covenant, but in no other form. This is a parallel case.

It has been already shown, that the prohibition in this case does not amount to a condition. It is, I apprehend, equally clear that it cannot be construed to be a covenant. There are no words which, upon any construction, can be held to import a covenant. It is true, the law will sometimes imply a covenant, where none is expressed, for the purpose of giving effect to the intent of the parties. But the plaintiffs here claim that the prohibition in question was inserted, for the benefit not of the grantor, but of Gabriel N. Phillips, the ancestor. The court then is called upon to imply a covenant in favor of a person not a

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party to the deed. There is, I apprehend, no precedent for such an implication.

It is well settled, that an exception or reservation to a third person, not a party to the deed, is void. (*Shep. Touch.* 80; *Co. Lit.* 47 A; *Moore v. The Earl of Plymouth*, 3 Barn. & Ald. 66; *Hornbeck v. Westbrook*, 9 John. 73.) The same is true of a condition, in favor of a stranger to the deed. (*Jackson v. Topping*, 1 Wend. 388; *Co. Lit.* 214; *Shep. Touch.* 120.) It would scarcely be in harmony with these rules to create, by mere legal implication, a restriction by way of covenant, which would be void in any other form. The law will never, I think, imply a covenant in favor of a stranger to the deed; were it possible in this case, consistently with established rules, to connect the two deeds and bonds together, and construe them all as a single instrument, the conclusion might be different. But if that were done, the prohibitory clause could not be held to amount either to exceptions, reservations or conditions, although it would, I am inclined to think, be possible to raise upon them, by implication, mutual covenants on the part of the grantees, to abide by the terms of the respective restrictions. But construing the deeds separately, as we are obliged to do, it is clear that this cannot be done. The only remedy of the grantees is upon the bonds.

This conclusion, drawn from the previous reasoning, renders it unnecessary to consider any of the questions in respect to the transfer to Gabriel N. Phillips of the rights supposed to have been reserved by Moses Phillips, because no such rights were reserved.

The claim set up in the complaint to a right by prescription to the exclusive use of the waters of the Walkill, for grinding grain, is denied by the answer, and is wholly unsupported by the proof.

The judgment of the general term must be affirmed.

All the judges, except RUGGLES, who did not hear the argument, concurred.

Judgment affirmed.

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*Seaman against Duryea.*

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**SEAMAN *against* DURYEA and others.**

A surrogate has jurisdiction to compel the guardian of a minor, appointed by him, to account as to the estate of the infant.

On a final accounting he has authority to settle the account of the guardian, and determine the balance remaining in his hands.

The surrogate's court may, by the decree made on such accounting, order the guardian to pay this balance to another guardian appointed in his stead, or to the ward, if he has attained his majority.

For a neglect or refusal to comply with such decree, the guardian may be proceeded against in the surrogate's court, by attachment against his person, as for a contempt.

It is not requisite that the process of commitment, issued by the surrogate in such a proceeding, should recite all the facts and proceedings necessary to confer jurisdiction.

It is sufficient if upon its face it appears to have been issued in a proceeding of which the surrogate had jurisdiction, states in substance the cause of commitment, and specifies the act or duty to be performed, and the expenses to be paid.

**APPEAL** from a judgment of the supreme court, sitting in the second district.

The complaint alleged that in June, 1848, at the city of New-York, the defendants wrongfully seized the plaintiff, and carried and conveyed him to the jail in the county of Orange, and there imprisoned him during a considerable space of time, and until he was discharged by an order of the supreme court. The defendants, Duryea, Booth and Welling, answered jointly, and the defendant Mead separately. In each answer it was alleged, as one defense to the complaint, that the plaintiff, in 1834, was appointed by the surrogate of the county of Orange, guardian of the person and estate of Josiah Mead, one of the defendants, then an infant; that the plaintiff accepted the appointment, and while acting as guardian became possessed of money of the infant; that in 1839, Mead have attained the age of fourteen years, one Ball was, by the surrogate of Orange county, appointed guardian of his person and estate, and assumed the

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*Seaman against Duryea.*

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duties of the appointment; that in 1844, on the petition of Ball as guardian, the plaintiff was cited to appear before the surrogate, to render an account as such guardian, and that the citation was personally served upon him; that due proceedings were had upon the petition, and on the 9th of July, 1844, the surrogate made and entered a decree in the matter, whereby it was, among other things, ordered and decreed that the plaintiff, late general guardian of Josiah Mead, pay to Ball, then guardian of said Mead, the sum of \$427.37, within thirty days from service of a copy of the decree upon him, and that upon complying with the decree the plaintiff be discharged from liability as to the property which came to his hands as guardian, and that the account, as settled by the decree, be final and conclusive on all parties to the same; that a copy of the decree was served on the plaintiff, and payment of the amount therein specified demanded, and that he neglected and refused to pay over the same, or any part thereof; that after more than thirty days had elapsed from the service of a copy of the decree on the plaintiff, and on the 31st of May, 1848, the defendant Duryea, then the surrogate of the county of Orange, on proof of such service, demand and non-payment, made an order in said matter, by which, after reciting the proceedings, it was ordered that an attachment issue out of and under the seal of the surrogate's court against said plaintiff, to be directed to the sheriff of the city and county of New-York, and commanding him to arrest the plaintiff and bring him before the surrogate of the county of Orange, on the 26th day of June then next, to answer for his misconduct in not paying said sum of \$427.37 and interest, pursuant to said decree, and that the plaintiff should give a bond for his appearance to answer on the attachment, in the penalty of \$800. That thereupon, on the 31st of May, 1848, an attachment was issued by the surrogate against the plaintiff; it recited the decree, service of a copy of the same on the plaintiff, and a demand of the amount thereby required to be paid, and his neglect and refusal to pay the same, and commanded the sheriff to arrest and bring him before the surrogate, on the 26th of June then next, to

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*Seaman against Duryea.*

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answer for his misconduct in not paying the amount mentioned in the decree. That this attachment was delivered to the sheriff of the city and county of New-York, who arrested the plaintiff thereon, when he gave the bond required, to appear before the surrogate at the time and place mentioned in the attachment.

That the plaintiff appeared before the surrogate, pursuant to the command of the writ, whereupon interrogatories were filed and served upon him, specifying the misconduct complained of, to which he made answers; and that such proceedings were thereupon had in the matter, that the surrogate, on the 26th of June, 1848, made an order, in and by which it was, among other things, ordered that the plaintiff pay to said Mead, who had then attained his majority, the said sum of \$427.87 with interest, from the 29th of July, 1844, and that he be committed to the jail of the county of Orange, there to remain charged for said contempt until he paid such amount and sheriff's fees, unless sooner discharged, and that a warrant so committing him issue to the sheriff.

That in pursuance of such order, the surrogate, on the said 26th of June, issued under his hand and the seal of his court, a precept which was set out in the answer. The precept was directed to the sheriff of the county of Orange, and recited that by an order made in the surrogate's court, on said 26th of June, in the matter of the final settlement of the account of the plaintiff as guardian of the estate of Mead, it was ordered that the plaintiff pay to Mead, who was then of lawful age, the sum of \$427.87, with interest from the 9th of July, 1844, and that he be committed to the jail of the county of Orange, there to remain charged with the contempt mentioned in said order until he should pay said sum and interest, and that a warrant issue for that purpose to the sheriff of the county of Orange; and commanded the sheriff to take the plaintiff, and him safely keep in his custody in the jail of said county, until he should pay said sum and interest, with the sheriff's fees, or until the surrogate's court should make an order to the contrary, or the plaintiff be discharged by due course of law. That this precept was deliv-

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*Seaman against Duryea.*

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ered to the defendant Welling, then sheriff of Orange county, and that under and by virtue of the same, the plaintiff was taken and confined in jail until discharged as alleged in the complaint; which were the same taking, detention, &c. complained of. To this defense the plaintiff demurred, on the ground that the same and the facts therein set forth did not constitute any defense in law to the complaint.

At a special term of the supreme court, held by Mr. Justice Brown, judgment was rendered in favor of the defendants on the demurrer. (*See 10 Barb. S. C. R. 523.*) This judgment was affirmed at a general term; and the plaintiff appealed to this court.

*Moses Swezey*, for the appellant.

*S. J. Wilkin*, for the respondents Duryea, Welling and Booth.

*W. C. Hasbranck*, for the respondent Mead.

W. F. ALLEN, J. By statute, authority is conferred upon surrogates to appoint guardians for minors, to remove them, and to direct and control their conduct and to settle their accounts as provided by law. (2 R. S. 220, § 1.) By other provisions of law, guardians may, upon the arrival of their wards at full age, or upon their removal or resignation of their trust, be cited and compelled to account before the surrogate by whom they have been appointed, in the same manner as administrators; and such accounting may be had as well at the instance of the guardian as of the ward, or any relative of the ward, or a new guardian who may have been appointed; and appeals may be taken from the final order of the surrogate in the settlement of a guardian's account to the supreme court, as in the case of administrators. (2 R. S. 152, §§ 11, 13. *Laws of 1837, ch. 460, §§ 50, 54.*)

It was the intent of the legislature, in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guar-

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dians, and to supersede the necessity of a resort to the court of chancery for that purpose. In other words, for all the purposes of settling accounts between guardians and wards, and finally adjudicating thereon, the surrogate's court was invested with all the jurisdiction which had before been exercised by the court of chancery, to be exercised, however, in the cases and in the manner prescribed by statute; and while surrogates' courts can only exercise the jurisdiction expressly conferred upon them, the statutes being remedial and for the advancement of justice, should receive a favorable construction, and such as will give to them the force and efficiency intended by the legislature. (*People v. Pelham*, 14 *Wend.* 48.) If the powers of the surrogate should be restricted to requiring the guardian to render an account of his doings, which may in a limited sense be held to be an accounting, or if it should be held that the surrogate is invested with power to examine the account rendered, allow and disallow items, and finally adjust and settle the same, and strike a balance, without power to decree the payment of such balance, the remedy will come far short of that afforded by the court of chancery, and the legislature will have failed to provide the substitute they designed. The parties pursuing will be compelled to resort to another court by an independent action, to obtain the relief which before would have been had in one action. The chancellor, in *Skidmore v. Davies*, (10 *Paige*, 316,) says, it is a matter of course to require a guardian, upon his removal, to account and to *pay over* the balance, if any, which shall be found in his hands upon such accounting; and he is speaking of proceedings in surrogates' courts. The accounting to which a guardian may be subjected, by proceedings before the surrogate, is not only a statement of his receipts and disbursements with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. The payment is a part of the accounting. An officer or trustee could not be said to have accounted to his government, superior officer or *cestui que trust*, in



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respect to his office or trust, who should state a just account of the moneys in his hands, and which he ought to pay, but which he should nevertheless neglect or refuse to pay. The bond of a guardian is conditioned that he will in all things discharge the duty of a guardian to the minor according to law, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required. (2 R. S. 151, § 8.) And it would hardly be claimed that the refusal to pay over an ascertained balance, would not be a breach of this condition. It was not necessary to provide in terms for a final decree, as was done in the case of administrators and executors in respect to creditors, legatees and distributees, for the reason, that none but the pursuing party would be entitled to any part of the moneys which might be found due from the accounting party; but if express authority to make a final decree should be necessary, the statute authorizing such decree in the case of administrators is by reference incorporated into, and made a part of the statute regulating the settlement of the accounts of guardians. The entire statute in respect to the settlement of the accounts of executors and administrators including the final decree is remedial, and so far as applicable regulates corresponding proceedings in behalf of or against guardians. The law of 1837, (*ch.* 460, § 63.) authorizing the docketing of any decree which may be made by a surrogate for the payment of money by a guardian, and an execution to be issued thereon, is a strong expression of the legislative opinion of the power of the surrogate to make such decree, for it assumes that the power exists. The surrogate has authority to compel the guardian to account, which includes the payment of any sum which may be found in his hands, and necessarily implies power to make the necessary order or decree in the premises, and this aside from the general power to control and direct the conduct of guardians. The accounting is incomplete until payment of the money, and the whole is a "process" which may be enforced by attachment, to be issued by the surrogate under

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2 R. S. 221, § 6. I cannot doubt that the final order or decree of the surrogate upon an accounting, from which an appeal may be taken, is a decree striking the balance and directing the payment of any amount found to be in the hands of the guardian, and for non-compliance with which an attachment may be issued. Trust moneys and property being kept entirely separate from the individual money and property of the guardian, and ready to be delivered at any time, it was fit and proper, that disobedience of an order of a court of competent jurisdiction requiring this, should be treated as a contempt, and punished as such.

In contemplation of law, the trust fund at all times remains in specie or invested as required by law, and the money or the proper securities are or should be in a situation to be delivered over at once; and hence an order or decree directing this to be done, is not like an ordinary judgment for a given amount, in an action at law, which can properly be enforced only by the ordinary process of execution.

The attachment in this case is a substantial compliance with the statute. It is in form similar to that used by the court of chancery in analagous cases. (2 R. S. 221, § 6.) It specifies the act or duty to be performed and the expenses to be paid. (2 R. S. 538, § 24.) It was issued in a matter and recited proceedings over which the surrogate had jurisdiction, and it is not necessary that the process should recite all the proceedings. The cause is substantially stated, which is sufficient. (*People v. Nevins*, 1 Hill, 154.) If there was a jurisdictional defect in the proceedings, it should be shown by the party complaining of them. The process, upon its face setting out a substantial cause of commitment in a matter or proceeding of which the surrogate had jurisdiction, was *prima facie* a protection to all concerned in the arrest.

The judgment of the supreme court must be affirmed, with costs.

DENIO, JOHNSON, PARKER, EDWARDS and SELDEN, Js., concurred in the foregoing opinion.

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Van Alstyne *against* Erwine.

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GARDINER, C. J., delivered an opinion in favor of reversing the judgment of the supreme court, and rendering judgment for plaintiff on the demurrers.

RUGGLES, J., did not hear the argument, and took no part in the decision.

Judgment affirmed.

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VAN ALSTYNE and others *against* ERWINE, sheriff.

Notwithstanding the statute, (2 R. S. 18, § 62,) as to the effect of the appointment of trustees in proceedings by attachment against absconding and concealed debtors, any person sought to be affected by their appointment may raise the question that the officer appointing them had not, on the face of the proceedings, jurisdiction to issue the attachment.

It is a compliance with the statute, (2 R. S. 3, § 4,) requiring the application for an attachment to be verified by affidavit, if the affidavit is indorsed upon and details all the material facts contained in the application, although, in terms, the affidavit does not refer to it.

Where it is doubtful whether the debtor has departed from the state, or keeps concealed therein, with the intent specified in the statute, the application for an attachment is sufficient, if it charge in the disjunctive that he has done the one or the other.

So the application may charge that the *intent* of the debtor was to defraud his creditors, or to avoid the service of civil process, where it is doubtful which was his purpose.

Every witness not a party to, or apparently connected with a proceeding or issue, is to be deemed free from interest therein till the contrary is proved. *Per* DENIO, J.

Affirmative proof need not be given on an application for an attachment, that the witnesses, who verify the facts and circumstances to establish the grounds of the application, are disinterested.

Nor in a suit between the trustees and third persons, as to property claimed by them as such, can the jurisdiction of the officer to issue the attachment, be impeached by extrinsic evidence that these witnesses had a disqualifying interest.

APPEAL from a judgment of the supreme court sitting in the fourth district. The action, which was commenced in 1848,

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was brought to recover the value of certain personal property, being a stock of goods in a store, which it was averred the defendant had converted to his own use. The cause was tried in 1849, at the Montgomery county circuit, before Mr. Justice Parker and a jury. On the part of the plaintiffs it was claimed, that prior to the issuing of the attachment hereinafter mentioned, the property was owned by David C. Anthony; and they made title to it, as trustees under proceedings by attachment issued against him as an absconding or concealed debtor. The defendant, after the first publication of the notice under the attachment proceedings, had taken the property by virtue of executions against a person of whom David C. Anthony had purchased it, alleging that the conveyance to Anthony was fraudulent as against the creditors of such former owner; and the character of that transfer was one of the questions litigated on the trial. Upon this appeal, the only questions which were made, with a single exception, related to the legality of the attachment.

On the 23d day of March, 1848, Christian Anthony presented to the county judge of Montgomery county a petition, setting forth that David C. Anthony was indebted to him in the sum of \$3074, over and above all discounts, "as appears by the affidavit of your petitioner hereto annexed;" that David C. Anthony "being an inhabitant of this state has secretly departed therefrom, with intent to defraud his creditors, *or* to avoid the service of civil process, *or* keeps himself concealed therein with the like intent," &c. The petition then prayed that an attachment might be issued. This paper was not sworn to, but there was indorsed upon it (and as the bill of exceptions stated, forming a part of it) an affidavit of the petitioner, duly sworn to, stating the same facts as to the petitioner's debt, and the conduct of David C. Anthony, which are contained in the petition, and in the same terms. Annexed to this petition and affidavit were the affidavits of two witnesses, Peter C. Anthony and Jacob C. Anthony, sworn to on the 23d of March, 1848; each of these affidavits stated in terms that, as the deponents respect-

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ively believed, D. C. Anthony, being an inhabitant of this state, had secretly departed therefrom, &c., using the same language with the same alternative expression as in the petition. Each of the affidavits stated that the belief of the deponents respectively were established by certain facts and circumstances, which followed. In Peter C. Anthony's affidavit, the statement was as follows: "That on or about the 10th day of February last, this deponent (then being one of the clerks of the said David C. Anthony at his store in Canajoharie) was informed by said David C. that he was going to Columbia, in the county of Herkimer, on some business, and that he intended to return within a few days. That said David C. left Canajoharie on that day, and has not since returned, to the knowledge of this deponent. That deponent has up to this time continued to act as clerk for him the said David C., and that deponent has made inquiry and diligently searched, and has every way in his power endeavored to find the said David C., or to ascertain where he might be found, but has not succeeded. And this deponent further says, that the said David C. was considerably in debt to the petitioners named and others at the time of his departure." The statement in the other affidavit was in these words: "That this deponent is the brother of the said David C. Anthony, and that on or about the tenth day of February last, said David C. left home on pretense of going to Columbia, in the county of Herkimer, to collect money, which he claimed to have due him there, and that the said David has not yet returned to Canajoharie, his place of business; and that after he had been absent several days longer than deponent understood he intended to be absent, deponent went in search of him, but was unable after diligent search and inquiry to ascertain where he might be found, or to obtain any information from him, except that after he returned to Herkimer from Columbia, he took the cars for some place west. And deponent further says, that the said David C., at the time he left in the manner above stated, was considerably indebted to Christian Anthony, the petitioner named in the annexed petition, and to other individuals."

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Upon these papers the judge issued an attachment, upon which a deputy of the sheriff attached the property in controversy; and the regular publications having been made, the judge, on the 5th day of July following, appointed the plaintiffs trustees of the creditors of D. C. Anthony, according to the statute.

The defendant's counsel objected to these papers on the trial, on the grounds that the application for the attachment was not verified according to the statute; that it was in the alternative, that the debtor had departed from the state, or was concealed within it, without stating which; that the alleged facts and circumstance detailed in the affidavits did not furnish a sufficient ground for the attachment. The judge overruled the objection, and the defendant excepted.

The defendant's counsel then offered to prove that each of the witnesses was interested in this manner, viz. that each of them was a creditor of D. C. Anthony in 1847, and in February and March in that year, each of them had assigned these demands with their other property to trustees for the benefit of their creditors, reserving the residue after the payment of their debts to themselves, respectively. The plaintiffs objected and the evidence was excluded, and the defendant again excepted. At a subsequent stage of the trial the offer to prove that the witnesses were interested was renewed, without any explanation of the kind of interest which was to be proved. The same disposition was made of the offer, and an exception was taken.

Amongst other testimony to show the value of the property, the plaintiffs examined William Baker, who was one of the appraisers on the execution of the attachment. He testified, upon the plaintiffs' examination, that the property was of the value which the appraisers placed upon it, and that he thought that amount could be realized for it by selling it at auction. The defendant's counsel put the following question: "What were the goods worth to a creditor, to convert them into cash within a limited time by a legal sale?" The plaintiffs' counsel objected and the court sustained the objection. The defendant's counsel excepted.

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The plaintiffs obtained a verdict, and the judgment was affirmed at a general term ; from which the defendant appealed.

*T. Jenkins*, for the appellant. I. The want of jurisdiction is always open to inquiry, either directly or collaterally. The attachment being void is of no force against any one, party or stranger to it. (*Decker v. Bryant*, 7 Barb. 183.) II. An attachment being a statutory remedy, the proceedings must strictly conform to the provisions of the act, or the judge has no jurisdiction to issue the attachment, and the want of jurisdiction is not remedied by the appointment of trustees. (*Matter of Faulkner*, 4 Hill, 598 ; 9 Wend. 465 ; 9 Cowen, 227 ; *Staples v. Fairchild*, 3 Comst. 41 ; 7 Barb. 183.) The application for the attachment was not verified by the affidavit of the creditor. (1 R. S. 3, § 4.) 1. If it be said that a separate affidavit setting forth the facts is equivalent to a verification of the application, the answer is that the statute has not prescribed any such affidavit. 2. An application not verified is no application. 3. Perjury could not be assigned upon such an affidavit, however false ; for the pleader could not truly allege in the indictment that the application was verified by the applicant. III. The application for the attachment is void for uncertainty. It does not disclose whether the attaching creditor proceeded upon the ground that David C. Anthony had departed from the state with intent to defraud his creditors, or whether he had so departed to avoid the service of civil process, or whether he had departed from the state all. Nor does the application disclose whether the attaching creditor proceeded upon the ground that David C. Anthony kept himself concealed within the state to defraud his creditors, or to avoid the service of civil process ; but the application proceeds upon one of these grounds, without specifying which. This is not authorized by the words or policy of the statute, because, 1. The form of the statute plainly indicates that the attaching creditor shall proceed upon one of the grounds. (2 R. S. 1st ed. p. 3, § 1, subd. 1.) 2. The oath of the attaching creditor to the truth of the appli-

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cation is required. (*Id.* § 4.) That oath, under so many disjunctives, can be of little security to the debtor. 3. The debtor has the right to contest the truth of the application. (*Id.* § 45.) So have certain persons, holding property assigned to them by the debtor. (§ 53.) The issue in such case is made upon the said *application* of the attaching creditor, and if formed as this is, it would be as vexatious to try as an issue upon a declaration claiming a right to recover upon a note, or a bond, or a judgment, without specifying which. (*The People, ex rel. J. & B. Van Valkenburgh, v. The Recorder of Albany*, 6 *Hill*, 429.) IV. The same objection equally applies to both affidavits of the witnesses for the attachment. V. The county judge could not, for he had no right to act in a judicial capacity, until such facts and circumstances were disclosed in the affidavits of two disinterested witnesses, as would properly bring the case before his mind for adjudication. 1. The affidavit must set forth *legal* evidence of the requisite facts, and not hearsay, or what is equivalent to hearsay only. (*Matter of Faulkner*, 4 *Hill*, 601; 18 *Wend.* 611.) 2. They must "have a legal tendency to make out a proper case in all its parts." (*Staples v. Fairchild*, 3 *Comst.* 41, 46; *Castellanos v. Jones et al.*, 1 *Selden*, 164.) 3. If *either* of the witnesses wholly omit to state "any one essential fact, the process will be declared void." (3 *Comst.* 46, *per Jewett*; 7 *Barb.* 182.) VI. The affidavit of Peter C. Anthony is essentially defective. What *facts* and *circumstances* does he put forth? (6 *Hill*, 314; 4 *Denio*, 118.) VII. The statute requires that the witnesses should be disinterested, and hence the court erred in rejecting the proof offered by the defendant, that Peter C. and Jacob C. Anthony were interested witnesses.

*N. Hill, Jr.*, for the respondents. I. The officer who issued the attachment, acquired jurisdiction by *the papers laid before him*; and the plaintiff's title, therefore, cannot be questioned even by the debtor, much less by the defendant. (2 *R. S.* 12, § 62; 4 *Hill*, 599, 595, 600.) 1. The objections taken to the



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application, and the affidavit of the creditor verifying it, were clearly unfounded. (2 R. S. 3, § 1, *subd.* 1, 8, 4; see 4 Hill, 598, 601.) 2. The affidavits of the witnesses verifying the facts and circumstances made a strong case. It is enough, however, that they called for an exercise of the officer's judgment on the question. (4 Hill, 598; 20 Wend. 145; 21 *id.* 816; 4 Denio, 120, Bronson, C. J.) II. The offer to show by evidence *aliunde* that the witnesses were interested in the manner specified, was properly overruled for the following reasons, among others: 1. The interest evinced by the facts alleged in the answer and offered in evidence was not a *fixed* or *disqualifying* one, but was *contingent, uncertain* and *remote*. Indeed, the offer showed no pecuniary interest of any kind. (4 Denio, 515, and cases cited; see 16 John. 162.) 2. The defendant cannot insist that his subsequent offer related to a different kind of interest than the one alleged in the pleadings, and evinced by the facts previously proposed. If he intended this he should have explained, or made his offer more specific. (10 Mart. Louis. R. 637, 8; 7 Barb. 470; 35 Eng. Com. Law Rep. 403, 4; 6 Barb. 335.) 3. Again, the officer's jurisdiction depended on whether the papers laid before him imported a compliance with the statute, and this was the only inquiry left open after the appointment of trustees. (2 R. S. 12, 13, § 62; 15 Wend. 372; 4 Hill, 599, 600; see 4 Denio, 120; 19 Eng. Com. Law. Rep. 10; 4 J. B. Moore, 294.) 4. After the appointment of trustees, moreover, the question whether the witnesses were interested became essentially unimportant, for the debtor was then precluded from denying what they have sworn to, viz. that there was *in fact* good ground for the attachment. (4 Hill, 599, 600.) III. But whatever may have been the rights of the debtor, or those claiming under him, to question the competency of the witnesses, &c., the defendant who claims in hostility to them had no such right. (20 Verm. R. 633, 639, 640.) 1. The provision that the witness shall be disinterested, is for the benefit of the debtor and those claiming under him; and they may waive or renounce it. (2 R. S.

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8, § 5; see 16 *John*. 162, 164, 5; *Broom's Leg. Max.* 309, 310; 24 *Wend.* 337, 339; 6 *Hill*, 47; 5 *id.* 468, 472.) 2. The plaintiffs show at least a *prima facie* title as assignees of the debtor by operation of law, and he has also acquiesced in the transfer. The defendant can no more dispute this title than if it had been conferred by the debtor's own act, or his express consent. (2 *R. S.* 12, 13, § 62; 2 *id.* 41, § 6; 15 *Wend.* 372; see 2 *Cush. R.* 124, 129; 13 *Wend.* 35, 40.) 3. The plaintiffs' title having been acquiesced in by the debtor and his creditors, if either should sue the plaintiffs for misconduct as trustees, it would be no defense for them that the witnesses were interested.

DENIO, J. Notwithstanding the strong language of the provision relating to the effect of the appointment of trustees in proceedings by attachment, I do not entertain any doubt but that a person who is sought to be affected by such an appointment, may raise the question that the officer did not acquire jurisdiction to issue the attachment. It is so upon general principles, and the point has been frequently decided. (2 *R. S.* 12, § 62; *Matter of Hurd*, 9 *Wend.* 465; *Staples v. Fairchild*, 3 *Comst.* 41.) It becomes necessary, therefore, to examine the various objections upon which it was insisted, on the trial that the judge acted without jurisdiction.

(1.) It is argued, in the first place, that the application was not verified by the affidavit of the creditor, as required by the fourth section of the act. (2 *R. S.* 3, § 4.) The application was in writing, and contained the several matters required to be shown to entitle the creditor to the remedy sought; but instead of the ordinary jurat, there was an affidavit at length indorsed on the application, setting forth and affirming in detail each of the matters of fact set out in the application, which were repeated in the affidavit. This was clearly sufficient. It was not the address of the petition, or its prayer, which were required to be verified; but the allegations of fact contained in it. An affidavit, which should have stated by way of reference that the several matters alleged in the petition were true, would have been clearly unob-

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jectionable, and such is the form which the defendant's counsel considers the proper one. But the mode adopted was the same in substance. The only difference is that the facts were repeated in language, instead of being simply referred to. It cannot be said that the mode adopted does not conform to the statute as truly as the other. The affidavit was a part of the petition, though it did not in terms refer to it. (*Roberts v. The Chenango County Mu. Insurance Company*, 3 Hill, 501.)

(2.) It is objected that the application is in the disjunctive; that the debtor had departed from the state *or* was concealed within it, with intent to defraud his creditors; and it is said that the creditor should have stated his case under one or the other aspect, and not in the alternative. The remedy is precisely the same, whether the debtor had absconded or was concealed, no difference whatever existing in the proceedings in the two cases. A case may be so circumstanced that, although it may be conclusively shown that the debtor has left his place of residence in order to defraud his creditors, by depriving them of their remedies, yet it may be impossible even to conjecture whether he has continued his flight beyond the boundaries of the state, or has resorted to some place of concealment in it. The affidavits disclose such a case in the present instance. If the objection is well founded there could be no proceeding under this statute in a case thus circumstanced. The debtor would have only so to conduct his evasion as to make it uncertain which course he had adopted, and he would avoid this remedy. I do not think the statute requires such a construction. The case referred to by the defendant's counsel implies, that where the circumstances are such that it is doubtful in what particular the defendant's conduct has brought him within a statute, the creditor has only to state all the facts, without electing which aspect he will adopt. (*The People v. The Recorder of Albany*, 6 Hill, 429.) In this case, the facts were laid before the officer, not, it is true, in the application, which is not the paper which should contain them, but in the affidavits of the witnesses, where they are required to be stated. The precise course was pursued which the court indicate

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as the proper one in the case cited. The same considerations apply to the other alternative—whether the debtor's intent was a general one to defraud his creditors, or whether it was to avoid the service of civil process. These remarks also answer the objection in this respect which was made to the affidavits of the witnesses.

(8.) It is then argued that the affidavits did not state facts sufficient to make a case upon which the officer could lawfully exercise his judgment. It must be conceded that the case made out was not a strong or very conclusive one; but I think the facts legally tended to support the allegation of absconding or concealment, with the intent alleged. The witnesses concur in stating that the debtor had left his home and place of business to go to an adjoining county, for an alleged purpose, which would not naturally have required a journey of more than two or three days. He had been absent about six weeks, and nothing had been heard of him. The witnesses, who were his clerk and his brother, had each made diligent search and inquiry for him, and the latter had gone to the county where his pretended business lay, and learned that he had gone west, but where or for what purpose is not stated, and, if the witnesses are honest, could not be ascertained. This was a suspicious course of conduct for a merchant, and yet it might possibly be explained in an innocent sense. The weakest point in the case is the connection of this conduct with the alleged motive, the defrauding of his creditors. It is said in both affidavits that he was considerably indebted to the prosecuting creditor and others, and both witnesses add their belief that his object in going off related to his creditors. It moreover appears that the petitioning creditor's debt was pretty large. The most probable explanation would therefore be the one given in the affidavits, and yet every judge, I should think, would have wished to examine these witnesses a little further, and to have ascertained the proportion which his ready means bore to his debts. It must be kept in mind, however, that the law has committed to the county judge, and not to us, the duty of determining as to the cogency of the proof. The criticisms

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which the defendant's counsel asks us to indulge in would, if generally applied to such proceedings, render them extremely hazardous, not only to the parties setting them on foot, but to the officers concerned in their execution; for when we determine that a sufficient case was not made for the exercise of the judgment of the officer, we must consider the judge and all the parties trespassers in whatever they do. A liberal indulgence must be extended to these proceedings even upon questions of jurisdiction, if we would not render them a snare rather than a beneficial remedy. I am of opinion that sufficient was stated to confer jurisdiction upon the officer. (*Matter of Faulkner*, 4 Hill, 598; *Johnson v. Moss*, 20 Wend. 145; *Miller v. Brinkerhoff*, 4 Denio, 120.)

(4.) The defendant offered to show that the witnesses were interested. The statute requires that they should be disinterested, (§ 5.) But there was nothing before the officer to show that they were not perfectly disinterested and indifferent, and I concur with what was said upon that question by Jewett, C. J. in *Staples v. Fairchild*, (3 Comst. 41.) He was of opinion that if nothing appeared to show that they had an interest, they were presumed to be disinterested. The officer obtained jurisdiction by means of the written proof laid before him; and that proof being regular, and nothing appearing to draw in question the qualification of the witnesses, it would form an alarming precedent to hold that in a collateral proceeding proof could be given to contradict the *prima facie* case appearing before the officer, when the consequence would be, to render the proceedings wholly void. It is essential to the value and usefulness of this remedy that titles derived under it should be sustained, unless their invalidity could be made apparent by an inspection of the papers. The provisions of section sixty-two appear to me to be intended to effect that object. It is declared by that section that the appointment of trustees shall in all cases be "conclusive evidence that the debtor therein named was a concealed, absconding or non-resident debtor within the meaning of the foregoing provisions, and that the said ap-

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pointment and *the proceedings previous thereto* were regular." (2 R. S. 12.) This, as we have seen, does not avoid the consequences of a defect of a jurisdiction on the face of the proceedings; still it was evidently intended to protect purchasers and others who have acted upon the faith of the proceedings from all question as to their title, or their acts, arising upon extrinsic evidence. If the title of these trustees can be impeached upon the ground now suggested, the title of a purchaser of real estate from them could be invalidated at any time within the period of limitation, by extrinsic proof that one of the witnesses had a technical interest in the attachment proceeding. This, I think, would be hostile to the main object of the section just referred to. The most plausible ground upon which this objection could be urged, would be to insist that there ought to be affirmative proof before the officer, that the witnesses are disinterested. But the existence of interest is exceptional, and I can see no reason why proof of its absence should be required, which would not apply in every case where witnesses are required to be disinterested. It was never alleged, while interest was an objection to a witness upon the trial of a cause, that the party to be examined must begin by showing that he was without interest in the issue. Every person not appearing to be connected with the issue is considered disinterested until the contrary appears. I am of opinion that the execution was not well taken.

The remaining question is upon the exception to the ruling of the judge, rejecting an inquiry put to the witness Baker, in which he was asked to state what the goods in question would be worth at a legal sale within a limited time. It is unnecessary to say whether the question might not have been competent by way of cross-examination, if the witness had not already answered a similar question. He had testified as to what in his judgment they would have brought upon a sale at auction, which was substantially the inquiry which was overruled. It was discretionary with the judge whether he would allow it to be repeated in another form of words.

The judgment of the supreme court should be affirmed.

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EDWARDS, J., also delivered an opinion in favor of affirmance.

GARDINER, Ch. J., and JOHNSON, SELDEN and PARKER, Js., concurred. ALLEN and RUGGLES, Js., did not hear the argument, and took no part in the decision.

Judgment affirmed.

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The action for seduction can be sustained, where the relation of master and servant exists actually or constructively between the plaintiff and the person seduced at the time of the seduction.

It is not requisite that a minor daughter should be actually in the service of or residing with her father at the time of the seduction, to entitle him to maintain the action.

It is sufficient that he was then legally entitled to her services, and might have required them if he chose to do so.

Accordingly, where a minor daughter left her father's and went to work for the defendant, and was seduced and became pregnant by him while in his employ, and remained absent from home till after her confinement and recovery; and there was no proof that the father took care of or expended any thing on her account during her sickness; *Held*, that he could recover damages of the defendant for her seduction.

APPEAL from a judgment of the superior court of the city of New-York.

The action was to recover damages for the seduction of the plaintiff's daughter by the defendant. The complaint alleged that the defendant debauched and carnally knew Maria, the daughter of the plaintiff, she then and during a long time thereafter being the servant of the plaintiff, and not twenty-one years of age, whereby she became pregnant and sick with child; and by means whereof the plaintiff was deprived of and lost her services, and was put to expense in taking care of her, &c. The answer denied specifically each allegation of the complaint.

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On the trial in the superior court, before Justice Sandford, in March, 1852, the daughter was sworn as a witness for the plaintiff, and testified that she then resided with her father, the plaintiff, and that she attained the age of twenty-one years in January, 1852; that in November, 1850, she left her home at her father's and went to work for the defendant, and that within a few weeks thereafter, and while in his employ, she was seduced by him and became pregnant; that subsequently, and before the birth of her child, she worked at other places, and finally was delivered of the child at a Mrs. Greenway's, where she was sick and unable to work during several weeks, by reason of her pregnancy and confinement. There was no evidence showing that she returned to her father's, from the time she went to work for the defendant until after her recovery from her sickness at Mrs. Greenway's, or that her father took any care of her, or expended any money on her account during her pregnancy or sickness.

When the plaintiff rested, the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground "that no expense or actual loss of service to the plaintiff had been proved." The motion was denied, and the counsel for the defendant excepted. Evidence was given by the defendant and the cause submitted to the jury, which rendered a verdict in favor of the plaintiff for \$3000 damages. The defendant tendered a bill of exceptions, and judgment having been perfected on the verdict and affirmed on an appeal to the general term of the superior court, he appealed to this court.

*J. Van Buren*, for the appellant.

*A. L. Pinney*, for the respondent.

EDWARDS, J. It was proved upon the trial that the plaintiff's daughter, at the time of her seduction, was in the defendant's service, and it did not appear that there was *animus revertendi*, or that she, in fact, returned to her father's house



until after her confinement. Upon this state of facts it was contended upon the part of the defendant that, as no expenso or actual loss of service on the part of the plaintiff was proved, he should be nonsuited, and a motion was made to that effect, which was overruled.

In the case of *Dean v. Peel*, (5 *East*, 45,) the plaintiff's daughter, at the time of her seduction, was under age, but was living in the family of another person, in the capacity of a housekeeper, with no intention at the time of her seduction of returning to her father's house, although she did return there while she was under age, in consequence of her seduction, and was maintained by her father. Upon this state of facts it was held, that as the daughter was actually in the service of another person than her father, and as there was no *animus revertendi*, the action could not be maintained. The rule thus laid down has been since followed in the English courts. (*Blaymire v. Haley*, 6 *Mees. & W.* 55; *Harris v. Butler*, 2 *id.* 539; *Grinnell v. Wells*, 7 *Man. & Gran.* 1033.) In a few years after the decision in *Dean v. Peel* a somewhat similar case arose in this state, in which it appeared that the plaintiff's daughter, who was under age, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement that she should continue to live in his house for any fixed time. While in her uncle's house she was seduced, and got with child. Immediately afterwards she returned to her father's house, where she was maintained, and the expense of her lying in was paid by him. Upon this state of facts it was held, contrary to the case above cited, that the action could be maintained. In delivering the opinion of the court, Ch. J. Spencer said, "the case of *Dean v. Peel* is against the action. In the present case the father had made no contract binding out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. She was his servant *de jure*, though

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not *de facto*, at the time of the injury; and being his servant *de jure*, the defendant has done an act which has deprived the father of the daughter's services, and which he might have exacted, but for that injury." (*Martin v. Payne*, 9 John. 387.) This decision was afterwards approved of in *Nickleson v. Stryker*, (10 John. 115.) In the case of *Clark v. Fitch*, (2 Wend. 459,) it was proved upon the trial that the plaintiff told his daughter that she might remain at home, or go out to service, as she pleased, but, if she left his house, she must take care of herself, and he relinquished all claim to her wages and services. It was contended that there was a distinction between this case and that of *Martin v. Payne*, on the ground, 1. That the father had given his daughter her time absolutely; 2. That he had in fact incurred no expense; but it was held that this made no difference, and that the personal rights of the father over the child were not relinquished. In the recent case of *Bartley v. Richtmeyer*, (4 Coms. 38,) Bronson, Ch. J., in giving the opinion of the court, says, that "our cases hold that the relation of master and servant may exist for the purposes of this action, although the daughter was in the service of a third person at the time of her seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure." But it was there held that the step-father had no such right, and consequently could not maintain the action. In Pennsylvania a similar rule has been adopted. (*Hornketh v. Barr*, 8 Serg. & R. 36; 6 *id.* 177. See also *Mercer v. Walmsley*, 5 Har. & John. 27.) And Greenleaf, in his treatise on evidence, lays it down as the established American rule. (2 *Greenl. Ev.* § 576.) Whether it be more or less consistent with principle and policy than the English rule, it is now too late to inquire. It is too well established by authority. The case of *Dain v. Wycoff*, (3 Selden, 191,) was cited on the part of the defendant; but it will be seen, by reference to the opinion delivered in that case that it was decided upon the very distinction which has been laid down in the adju-  
dication.

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tions referred to. In that case the plaintiff's daughter was *bound out to service* to another, and the plaintiff had no right to her services.

The judgment should be affirmed.

All the judges, except RUEGLES, who did not hear the argument and took no part in the decision, concurred.

Judgment affirmed.

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*BUSH against PROSSER.*

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Since the enactment of the code of procedure, the defendant, in an action for slander or libel, may prove in mitigation of damages facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge.

It is not necessary that the answer should allege the truth of the charge complained of, to entitle the defendant to aver and prove such facts and circumstances to reduce the amount of damages.

Accordingly, where in an action for charging the plaintiff with keeping a house of ill fame, the answer denied the complaint, and as a partial defense alleged lewd and lascivious conduct by the plaintiff's family, not amounting to a justification of the charge; *Held*, that evidence of such conduct was competent to reduce the amount of damages.

ACTION for slander, commenced in June, 1849. The complaint alleged that the defendant charged the plaintiff with keeping a house of ill fame. The defendant by his answer denied each allegation of the complaint, and in further answering alleged that, during five years next prior to the times mentioned in the complaint, the conduct of the wife and daughter of the plaintiff, who during that time were inmates of his house, was lascivious, unchaste and improper, and such as to induce the belief that the plaintiff did keep a house of ill fame; that the son of the defendant was induced, by the conduct of the plaintiff's

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wife and daughter, to visit the house of the plaintiff and to spend his time with the daughter at improper and unreasonable times, and to continue so to do, contrary to the injunctions and remonstrances of the defendant, which were well known to the plaintiff and his family; and that whatever was said by the defendant in relation to the matters in the complaint, was said without any malice towards the plaintiff or design to do him injury in his good name or otherwise, but the same was said in kindness to the plaintiff personally, and to the son of the defendant by way of remonstrance, he then being a minor. The plaintiff replied, denying these allegations in the answer.

The cause was tried at the Monroe circuit in May, 1850, before Justice T. A. Johnson and a jury. The plaintiff proved the speaking of the words alleged in the complaint. The defendant offered to prove that, during one or two years prior to the speaking of the words, his son was in the habit of going to the plaintiff's house and remaining there throughout the whole night, very frequently in the room with plaintiff's daughter and to his knowledge. This evidence was objected to and excluded, and defendant excepted. He also offered to prove that on one occasion his son in returning, after a short absence from home, stopped at the plaintiff's and remained there shut up in the house a week without coming home to his father's. This was objected to, excluded, and defendant excepted. The defendant also offered to show the circumstances and facts of lewd conduct on the part of the plaintiff's wife and daughter under the answer, which the court excluded, and the defendant excepted. The defendant offered to prove the facts mentioned in each of the foregoing offers, with the additional fact that he had previous to these occasions forbid his son visiting the plaintiff's house, and that the plaintiff was so informed but permitted the son to continue his visits, the son being a minor, and that known to the plaintiff. This was also objected to and excluded, and the defendant excepted.

The said justice charged the jury, "that the only circumstances and facts which should be regarded by the jury, or

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which were proper to be given in evidence in mitigation of the damages, was whether the words charged were spoken on a sudden heat of passion or other circumstances of that nature attending the speaking of the words;" to this the defendant's counsel excepted. The jury rendered a verdict for the plaintiff of \$1000, upon which judgment was rendered. Upon an appeal to the general term this judgment was affirmed. (*See 13 Barb. S. C. R. 221.*) The defendant appealed to this court.

*H. R. Selden*, for the appellant.

*H. J. Thomas*, for the respondent.

W. F. ALLEN, J. Unless a change has been wrought in the rules of evidence and the law applicable to this case, by the code of procedure, the justice was clearly right in excluding the evidence offered by the defendant in mitigation of damages. The facts and circumstances offered came far short of a justification of the charge made against the plaintiff, as understood by the court and jury, and it is conceded by the counsel for both parties that they tended to prove the truth of the words uttered. The authorities in this state, prior to the adoption of the code, speak but one language; and the rule was too well settled to be changed, except by the interposition of the legislature, that evidence of that character in actions for slander was at the common law inadmissible. The current of authority obligatory upon the courts of this state, notwithstanding some diversity of opinion in other courts and other states, was to the effect, that facts and circumstances which tended to disprove malice by showing that the defendant, though mistaken, believed the charge to be true when it was made, might be given in evidence in mitigation of damages; but if the facts and circumstances offered tended to establish the truth of the charge, or formed a link in a chain of evidence going to make out a justification, they were not admissible, in mitigation of damages. (*Cooper v. Barber*, 24 Wend. 105; *Root v. King*, 7 Cowen, 618; *Fero v. Ruscoe*,

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4 *Comst.* 162; *Purple v. Horton*, 18 *Wend.* 9; *Gilman v. Lowell*, 8 *id.* 573.) The rule appears to follow as the legitimate result of two other rules which were well established by authority, viz. 1. That evidence of the truth of the charge in justification could not be given under the general issue, but must have been specially pleaded. (*Underwood v. Parks*, *Str.* 1200; *Campbell v. Butts*, 3 *Comst.* 173.) And, 2. That a plea of justification was conclusive evidence of malice, and precluded all evidence tending to show an absence of malice, and necessarily enhanced the damages. (*Gilman v. Lowell*, *Purple v. Horton*, *Fero v. Ruscoe*, *cited above*.) Whether the latter rule might not originally have been, with great propriety and consistently with sound policy and good reason, very essentially modified, it is too late now to inquire. It is well settled to be the rule of the common law as understood and administered in this state, and unless it has been changed by the legislature, must be applied by us to this case.

It follows that the important question presented by the bill of exceptions is upon the construction and effect to be given to section 165 of the code, which, as amended in 1849, read thus: "In the actions mentioned in the last section, (libel and slander,) the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the mitigating circumstances." It is urged that the defendant, not having in his answer alleged the truth of the slanderous words, could not under the section quoted allege in his answer, or give in evidence upon the trial, mitigating circumstances in diminution of the damages; and to this effect are two decisions, pronounced by able judges, and therefore entitled to respect and consideration. (*Graham v. Stone*, 6 *How. Pr. Rep.* 15; *Brown v. Orvis*, *Id.* 376.) The objection assumes, 1. That proof of mitigating circumstances cannot be given, except under an answer in which the facts relied upon are alleged; and 2. That the only authority for spreading upon the record, by way of answer, facts

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that do not constitute an entire defense to the action, but simply go to restrict and limit the amount of the plaintiff's recovery, is confined by the section of the code referred to, and is therefore restricted to actions upon the case for defamation. I think this an unsound theory. At common law a partial defense could not be pleaded, for reasons peculiar to that system; and hence to avoid injustice, such matters which could not be pleaded were admissible in evidence under the general issue, and without notice to the adverse party. (*Wilmarth v. Babcock*, 2 Hill, 194; *Barber v. Rose*, 5 id. 76; 21 Wend. 273.) By the code the general issue is abolished; and the defendant may set forth, by answer, as many defenses and counter claims as he may have. (Code, §§ 149, 150.) The legislature, by the same act, also abolished all forms of pleading theretofore existing, and provided that thereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings were to be determined, should be those prescribed by that act. (§ 140.) So complete and thorough has been the departure from the former rules and forms of pleading, that it is hardly safe to rely upon analogies derived from that system in giving practical effect to the new. Based as the new is upon an entirely different theory, and having professedly different ends to accomplish, it is better, with a view to carry it out in its spirit, to consider it, as it is in truth, an entire new theory, to be construed and carried into effect according to its terms, and upon principles peculiar to itself. Difficult as it may be for a mind trained to the logical and truly scientific rules of pleading under which justice has so long been administered in states and countries in which the common law has had sway, to cast aside all the rules which have been supposed to be founded in wisdom, and in practice to have accomplished a good purpose, for a new and confessedly imperfect scheme, it is safe to say that it must be done in order to give effect to the provisions referred to, and to give the new system a fair trial; and that less injustice will be done in that way than by attempting to engraft the

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new upon the old, which can only be done to the prejudice of both.

Two objects of reference were made prominent in the changes made in the forms of pleading by the code. One was the introduction of verity into the pleadings by providing, in effect, that parties in their allegations should have the same regard to truth that prevails between members of society, in their daily communications with each other; that they should not willingly, and certainly not by compulsion, spread a falsehood upon the record; that a defendant should not be driven, or permitted even, falsely to allege a full defense, to the end that he might prove a partial defense. Another was, that the pleadings should inform the court and the adverse party of the facts alleged in support or defense of the action, and to which evidence was to be given; and hence common counts, general issues and all fictitious pleadings, were abolished. One alleged objection to the old forms of pleading was, that the record did not necessarily disclose the true questions of fact at issue and which were to be tried. With this understanding of some of the leading objects of the legislature, we may read the section which permits a defendant to set forth by answer as many defenses as he may have, and which originally authorized him to "set forth in his answer as *many grounds of defense* as he should have," (*Code of 1848*, § 129,) and recognizes the right to set up facts constituting either a total or partial defense to the action. Although defense may mean literally a denial of the truth or validity of the complaint, an assertion that the plaintiff has no ground of action, it has ceased to mean a justification, and as now used by courts and judges it is applied to matters which go to the partial as well as total extinguishment of the plaintiff's claim; and the terms total and partial defense have become quite familiar, and may well be supposed to have been in the mind of the legislature when they spoke of the "grounds of defense," or "the defenses" of a party to an action. (3 *Bl. Com.* 296.) It can hardly be that the legislature intended that when a party could not make a full defense to an action, and could not therefore with truth allege facts



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constituting a full defense, or fully deny the case made by the plaintiff, that he should be denied the privilege of alleging in his answer, and establishing by his proof a partial defense, or alleging and proving mitigating circumstances. If this was not intended, then the statute should be construed as giving authority to spread fact s constituting a partial defense, or tending to reduce the claim of the plaintiff upon the record by way of answer, as a "ground of defense" or as a "defense;" otherwise a return must be had to the former practice, which permitted partial defenses to be given in evidence without plea or notice. For the legislature never intended so to alter the law, that a party who could not make a full defense, should not be heard to make any; but in the language of another, should "be bound hand and foot, and handed over to a jury." It may be that whether the defendant may, under the provisions of § 150, set up in his answer facts constituting a partial defense and tending to mitigate the damages, or whether such matters may be given in evidence without such answer, is immaterial so far as this case is concerned, for the reason that, upon one or the other hypothesis, evidence of the character stated is competent on trials under the code. I am however of the opinion that the facts may and should be pleaded.

We then come to the consideration of § 165, which was not designed to prescribe what might be pleaded in defense of an action for slander, but was enacted to secure the full benefit of the right to plead at all to the defendant by blotting out the rule of the common law, which attached certain presumptions prejudicial to the defendant to one class of pleas. We have seen that by the rules of law, as established by a long series of decisions, a plea of justification was conclusive evidence of malice; and that if a party having alleged the truth of the charge failed to prove it, the damages were necessarily enhanced by the plea, and that the defendant would be deprived of the benefit of any evidence given under it, tending to prove the truth of the charges, but coming short of a justification, although they showed probable cause and entire good faith on the part of the defendant; and the object and design of the

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section, apparent from its terms as well as indicated by the commissioners of the code in their report, was to remedy this supposed injustice by changing the rule. Had this section not been adopted, it cannot be doubted that in actions for slander and libel as well as in other actions, mitigating facts and circumstances might have been given in evidence upon the trial; and whether with or without alleging them in the answer, would have depended upon the true construction of other provisions. The section under consideration only provided that mitigating facts and circumstances might be alleged in the answer, and proved upon the trial in the class of actions named in cases where it had theretofore been prohibited; and hence the peculiar phraseology of the provision, that the defendant might in his answer allege *both* the truth of the defamatory matter and any mitigating circumstances. It was assumed that each might be alleged separately, but before this enactment they could not stand together, and a plea of justification effectually concluded the defendant from the benefit of any evidence tending to disprove malice, and in that way to mitigate the damages. This provision effectually disposes of that rule by adopting one directly the reverse, and more consistent with principles of justice, and in harmony with the views of the legal profession. There is but little justice in punishing a man for availing himself of the forms of pleading, to enable him to make a defense in good faith, which he believes to be meritorious and valid, because he chances to fail. The law does it in no other case. If the privilege is abused for malicious purposes, it should then be matter in aggravation of damages—not otherwise.

It would seem to follow that, with the abrogation of the rules that lay at the foundation and constituted the reason for excluding evidence in mitigation of damages which tended to prove the truth of the charge, or which formed a link in a chain of evidence going to make out a justification, the rule itself should fall. It is implied by all the decisions that, but for the rules of pleading and presumption referred to, any evidence tending to disprove malice would be admissible, although it should tend to

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justify the charge. All the judges who have undertaken to assert the rule, have found it necessary to engraft the exceptions upon it, lest it should be understood that such evidence was within the rule. (8 *Wend.* 573; 6 *Barb.* 43; 18 *Wend.* 9; 4 *Comst.* 162; 7 *Cowen*, 613; 24 *Wend.* 105.) The guilt of and essential ground of action for defamation consists in the malicious intention; and when the mind is not in fault, no prosecution can be sustained. (2 *Kent's Co.n.* 26.) This malice the law implies from the falsity of the charge, except when the words are spoken in the performance of some recognized duty, or in the assertion of some right, in which case express malice must be shown, while in other cases express malice forms no part of the issue. (*Thorn v. Moser*, 1 *Denio*, 488; *Howard v. Sexton*, 4 *Comst.* 157.)

To repel and overcome in part this legal presumption of malice, the defendant has been heretofore permitted to prove facts and circumstances which show that the charge was made under a mistake of facts. (*Gilman v. Lowell*, *supra*.) Within the rule, he may give evidence of facts and circumstances which induced him to suppose the charges true at the time they were made. (*Purple v. Horton*, and *Cooper v. Barber*, *supra*.) But this rule as heretofore established must be taken with this qualification, that the facts must not tend to prove the truth of the charge; and the reason assigned for the qualification is, that if they are proved under a plea of justification, the plea itself being conclusive evidence of malice, cannot be overcome or rebutted; and if offered under the general issue, they are inadmissible, as tending to establish a defense which should have been specially pleaded, and for the additional reason assigned in some of the cases, that as a plea of justification was conclusive evidence of malice, *a fortiori*, the offering of proof of the truth of the charge was alike conclusive upon that question. But these rules are changed; and the reason of the rule under consideration having therefore ceased, the rule itself should cease. The report of the commissioners of the code show this result to have been within their intention in framing the provision; and as the provision itself is consistent with this view, it may be supposed

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that the legislature intended the same result. Probable cause for making the change, especially when that cause has been induced by or necessarily results from the acts of the plaintiff, together with entire good faith of the defendant in making it, does, in my judgment, show an absence of malice; and so far as malicious intention lies at the foundation of the action and of the claim for damages, should be taken into account, not as a full defense, but in mitigation of damages, as in *Gilman v. Lowell*. The action is vindictive, and the damages are punitive as well as compensatory; and so far as the former are concerned, all evidence tending to throw light upon the intent and motives of the defendant, which does not interfere with the established rules of law, may very properly be received. A plaintiff will not, in the hands of an enlightened court and jury, be very likely to suffer injustice from evidence which goes merely to give character to or explain the conduct of the defendant, and show under what circumstances and why he spoke the words, especially when the evidence is given under a disclaimer of all intention to justify the words or insist upon their truth. The course of legislation upon this subject tends very strongly to show that it was the intention to make this change in the rule now under consideration. The commissioners first reported the section authorizing the setting up of "any mitigating circumstances sufficient in law to reduce the amount of damages," which fully expressed their views, and would have authorized any circumstances which, under the law and the rules of pleading and evidence as modified by the code, would have been sufficient to reduce the damages. The legislature, without an intention to change the provisions, so far as I can discover, varied the phraseology, by making it read, "any mitigating circumstances legally admissible in evidence," and this was amended in 1849, by striking out "legally admissible in evidence," lest it might be construed as restricting the mitigating circumstances to such as were before admissible, which would have been in direct conflict with the residue of the section, which expressly authorized evidence to be given of mitigating circumstances

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which was before excluded. The facts offered in evidence, and which were rejected by the judge upon the trial, would have tended to disprove malice by showing the cause, if any, that existed for making the charge; and this the jury should know, to the end that they may understandingly measure the damages, and mete out to each party equal and exact justice.

The course of the decisions upon this branch of the law in other states and in England need not be examined in this connection, as they are sufficiently referred to by Selden, J., in his dissenting opinion in the court below in this case, and in *Follett v. Jewett*, (1 *Am. Law Reg.* 600,) in which I fully concur. I will merely add, that so long as the rule laid down by Gardiner, J., in *Howard v. Sexton*, is the law in this state, that to constitute an injury, for which an action of slander will lie, malice must be proved—not mere general ill will—but malice in the special case set forth in the pleadings, to be inferred from it and the attending circumstances, any evidence which legitimately shows innocency of motive may be given as a mitigating circumstance under the code, whether it conduces to prove the fact, while it falls short of it, or not. What effect should be given to the evidence is not for us to say. We merely decide that it was competent; and because it was excluded, the judgment of the court below must be reversed, and a new trial granted, costs to abide the event.

SELDEN, J. The questions presented in this case are of unusual interest. The principles regulating the admission of evidence in mitigation of damages, in actions for libel and oral slander, have given rise to much controversy and many conflicting decisions. The courts have struggled for more than a century with the incongruous rules which have prevailed on this subject.

An attempt has been made, through a provision of the code, to remove the difficulty. Section 165 provides, that in this class of actions the defendant “may in his answer allege both the truth of the matter charged as defamatory, and any mitigating

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circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." It is desirable that such a construction should be put upon this provision as will make the remedy it affords coextensive with the evils it was designed to remove.

What, then, were those evils? To answer the inquiry, it becomes necessary to glance at some of the principles which lie at the foundation of this class of actions. It will not be denied that malice on the part of the defendant is essential to the maintenance of the action. This is distinctly asserted by every elementary writer on the subject, and is confirmed by all the cases. But it is said that there need be no express malice, except in the case of privileged communications; that in other cases, implied or legal malice is all that is required. What is meant by *implied* malice? Does it mean malice which the law imputes without any proof of its existence? I apprehend not. It means this: that the fact that the defendant is shown to have uttered or published a false charge against another, which was calculated to injure him, *proves* that the defendant was actuated by malicious motives, unless the circumstances are such as to suggest some other and innocent motive. This is nothing more than the application of a familiar rule of evidence, viz. that every person is presumed to intend that which is the natural consequence of his actions. Where, however, the circumstances are such as afford ground for supposing an innocent and laudable motive—as where the charge is made in giving the character of a servant, or confidential advice to a friend—then the presumption which would otherwise arise from the falsity and injurious nature of the charge is repelled, and it becomes necessary to offer other evidence of malice. But is malice any more the ground of the action in cases of privileged communication than in others? Clearly not. It is called, for the sake of convenience, express malice in the one case, and implied in the other; but the malice is the same; the difference is in the proof alone. We may therefore assume, that in *all cases* malice is

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essential to the action. Not *imputed* malice merely, but actual malice; malice established by proof.

Our next inquiry is, whether the degree of malice has any bearing upon the measure of damages? If malice is an essential ingredient in the cause of action, it would seem to follow that the damages should be graduated more or less by the degree of malignity displayed. But it may be said that the object of the action is to obtain compensation for a personal injury, and that the extent of that injury does not depend upon the malice or innocency of intent of the defendant. I fully appreciate the general truth, that civil actions are designed to redress private and not public wrongs; and yet every one knows that the value of the administration of our civil jurisprudence consists not alone in the wrongs it redresses, but in those it prevents, and especially is this true of the class of actions we are considering. It will be found that, from the origin of the common-law actions which impute malice to the defendant, have been used to some extent to protect the public interests, and to repress the indulgence of those vindictive feelings which tend to disturb the peace of society. In this view the damages should, to some extent, be measured by the degree of malice proved.

But it is useless to speculate upon the question. There are numerous decisions going to establish the doctrine, that proof of positive malice on the part of the defendant, in this class of actions, has a legitimate tendency to enhance the damages. I shall refer to a few of the cases only. In *Defries v. Davis*, (7 *Car. & Payne*, 112,) which was an ordinary action of slander, the plaintiff offered evidence of a repetition of the slander, in aggravation of damages. Tindal, Ch. J., said: "You may shew any thing that is evidence of malice, but you must not shew any thing that would be the subject of another action." In *Bromage v. Prosser*, (4 *Barn. & Cress*. 247,) Bayley, J., says: "But in an ordinary action for a libel or for words, though evidence of malice may be given to *increase the damages*, it never is considered essential." In the case of *Root v. Lowndes*, (6 *Hill*, 518,) Judge Bronson, while he condemns and

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overrules the English *nisi prius* cases, which admit proof of the publication by the defendant of libels or slanders other than those charged, for the purpose of showing *quo animo* the charge was made, nevertheless holds, that a repetition of the same slander is admissible, citing the case of *Defries v. Davis*, (*supra*.) This court, too, in *Howard v. Serion*, (4 *Comst.* 157,) has confirmed the doctrine. Gardiner, J., says: "The plaintiff may show a repetition of the charge for which the action is brought; but not a different slander for any purpose." Of course, in all these cases the evidence is held to be admissible, to enhance the damages. It could be received for no other legitimate purpose, as it would be wholly unnecessary to the maintenance of the action. There are many other authorities to the same effect; but these must, I think, be sufficient to sustain the position, that in an ordinary action of slander, although the malice necessary to maintain the action is implied from the falsity of the charge, the plaintiff may, nevertheless, give evidence of express malice in aggravation of the damages. The elementary works all hold the same language.

Assuming then, what cannot well be denied, that affirmative proof of malice may be received to aggravate the damages and enhance the verdict, in cases where no such proof is necessary to maintain the action, it inevitably follows that if the defendant can show that he was not actuated by any malicious motive, he will thereby mitigate the damages; and that he must be permitted to give evidence for that purpose. It is clear, therefore, that the defendant has a right to prove the absence of malice in mitigation of the verdict; and to do this, it is of course indispensable to prove that he believed, and had some reason to believe, the charge to be true, when it was made. But how is he to make this proof? There are but two conceivable modes of doing it. One, by proving that he had received such information from other persons as induced him to believe the charge to be true; the other, by showing the existence of facts and circumstances within his knowledge calculated to produce such a belief. Repeated efforts have been made by defendants to avail



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themselves of the former of these modes. The general doctrine being conceded that a defendant had a right to repel malice for the purpose of mitigating the damages, there was plausibility at least in the position, that he should be permitted to show that he had been led into an honest belief of the truth of the charge by the information he had received. There has been much fluctuation upon this question in the English courts. But in this country the evidence has been rejected, for, as it appears to me, the soundest reasons. It has long been settled in this state and in Massachusetts, as well as most of the other states, that although evidence is admissible to prove the general character of the plaintiff to be bad, yet that no mere reports or rumors, not amounting to proof of general character, nor information obtained by the defendant from others as to the truth of the charge, unless accompanied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice. This necessarily reduces the defendant to the proof of facts and circumstances known to him at the time of making the charge, having a tendency to induce a belief of its truth, as the only means of showing a want of malice. Here, however, the defendant has been met in this state by the rule, that no facts or circumstances having a tendency to establish the truth of the charge, could be given in evidence under the general issue to mitigate the verdict. Of course, facts and circumstances which would warrant the defendant in believing the charge, *must be such* as would have some tendency to prove it to be true. This rule, therefore, effectually excluded the only evidence by which the absence of malice could be shown.

First, then, malice was presumed from the falsity of the charge; to this the plaintiff might superadd proof of positive malice, and thus aggravate the damages, while the defendant was precluded, by the rule which excluded all proof of facts tending to establish the truth of the charge, from giving any evidence to rebut malice in mitigation. Upon what did this rule of exclusion rest? Certainly not upon the *intrinsic impropri-*

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ety of the evidence. This is clear from the positions already established. It must have had some other foundation: what was it? The answer to this question is both simple and certain. The rule is merely an unforeseen consequence of that which excluded proof of *the truth of the charge*, under the general issue, in mitigation of damages; a rule which originated with the case of *Underwood v. Parks*, (2 *Strange*, 1200.) The courts have implicitly followed that case, without even seeming to consider that the rule it laid down, was not only a departure from the principles of the common law, and a pure piece of judicial legislation, but that, in its consequences, it must necessarily deprive defendants of all power to mitigate the verdict. Prior to that case, defendants in this class of actions were permitted to prove not only the absence of malice, but *the truth of the charge itself* in mitigation. This is shown by the case of *Smithies v. Harrison*, (1 *Lord Ray*. 727.) The reception of this evidence was in perfect accordance with the general principles of law. Courts have sometimes, in their speculations upon this subject, seemed to suppose that there was some inherent legal objection to proving, *in mitigation merely*, that which might amount to a *justification*; and have applied the rule which excludes proof of the truth of the charge in mitigation, as though that were its foundation. This however is an obvious error. It was never any objection to evidence in mitigation, that under a different state of the pleadings it would amount to a full defense. The rule in *Underwood v. Parkes* was not put upon any such ground. That was an action of slander. The defendant, under the plea of not guilty, offered to prove the words to be true, in mitigation of damages. The chief justice refused to permit it, saying, that, "At a meeting of all the judges upon a case that arose in the common pleas, a large majority of them had *determined not to allow it for the future*, but that it should be pleaded, whereby the plaintiff *might be prepared* to defend himself, as well as to prove the speaking of the words." The very terms here used show, that this was the introduction of a new doctrine by the common consent of the judges. It is clear from

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the reason given, that the intrinsic propriety or impropriety of the evidence had nothing to do with the adoption of this rule. It was a rule of pleading merely ; having no other object than to prevent plaintiffs from being taken by surprise upon the trial, by evidence of the truth of the charge. It was not designed to deprive defendants of the benefit of such evidence, or any evidence ; but simply to secure due notice to the plaintiff of what he would be required to meet. This was all very well in cases where the defendant was prepared to justify, which cases alone the judges had in view in adopting the rule. But when the doctrine came to be applied to cases where all the defendant could or desired to do was to mitigate the damages, by showing the absence of malice, it operated unjustly. It took away the right altogether, since the rules of pleading did not allow any thing short of a complete defense to be spread upon the record. The whole difficulty would have been obviated, if the judges had simply added to this rule a clause, permitting defendants to give with the general issue a notice of the facts intended to be proved in mitigation of damages. It would have been no greater stretch of power to have done this, than was required to prescribe the rule itself. But they evidently failed to foresee the conflict which must necessarily arise between the *conceded right* of the defendant to mitigate the damages, by showing the absence of malice, and *the rule* they adopted ; a conflict which can be clearly traced from that day to the present. The *right* and the *rule* were directly repugnant to each other ; and no question has ever given rise to a more protracted struggle.

The courts in England, under a sense of the admitted right, have in a number of cases decided, that facts and circumstances *falling short of proving*, although tending to prove the truth of the charge, might be received in mitigation. (*Knobell v. Fuller, Norris' Peake, Append. 32 ; Leicester v. Walter, 2 Camp. 251.*) But the courts in this state and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge, *must necessarily* exclude evidence tending to prove it. But it is a little

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surprising to observe how often judges have asserted in the same paragraph, both the *right* to mitigate by disproving malice, and the *rule* which effectually precluded the exercise of the right, without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the case of *Root v. King*, (7 *Coven*, 613,) judge Savage says, that the defendant "may show in evidence under the general issue, by way of excuse, any thing short of a justification which does not necessarily imply the truth of the charge or tend to prove it true, but which repels the presumption of malice arising from the fact of publication." The same judge, in *Purple v. Horton*, (13 *Wend*. 9,) says: "Facts and circumstances may be shown in mitigation, when they disprove malice, and do not tend to prove the charge, or form a link in the chain of evidence to prove a justification." Again, Judge Bronson, in *Cooper v. Barber*, (24 *Wend*. 105,) says: "Facts and circumstances which tend to disprove malice by showing that the defendant, *though mistaken, believed the charge true when it was made*, may be given in evidence in mitigation of damages. But if the facts and circumstances offered tend to establish the truth of the charge, or form a link in the chain of evidence going to make out a justification, they are not admissible in mitigation of damages." It does not appear to have occurred to either of these eminent judges, that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice, by showing "that he believed the charge true when it was made," without giving evidence tending to establish its truth; since a belief based upon information derived from others cannot be shown.

If malice may be repelled for the purpose of mitigation, what reason is there why it should not be done by proof of facts tending to show the truth of the charge as well as of any other facts? None has ever been given, except that which led to the adoption of the rule in *Underwood v. Parks*, viz. that the plaintiff might be taken by surprise. But is that a sufficient reason for

depriving a defendant altogether of the benefit of such evidence? Clearly not; and yet this has been the effect of that rule, as construed by the courts of this state, when combined with the other rule, which precluded the pleading of matter in mitigation. The obvious injustice of this result has induced the courts in many of the states, as well as in England, to disregard the logical consequence of the rule in *Underwood v. Parks*, and admit the evidence. In a late case in the state of Connecticut, *Williams v. Miner*, (18 Conn. R. 464,) Church, Ch. J., says: "We are not satisfied that a defendant should be deprived of the benefit of mitigating circumstances, for no better reason than that they conduce to prove the truth of the charge, *while they fall short of it*. We see no sufficient cause why he should not be permitted to prove such facts, as well as any other showing innocency of motive, and which can only be proved under the general issue." In this passage the chief justice expresses that dissatisfaction with the rule in question which has prevailed so extensively among judges. He also betrays the same misconception as to the foundation of the rule prohibiting proof of *the truth* of the charge in mitigation, which appears to have been so nearly universal. He says: "for no better reason than that they conduce to prove the truth of the charge, *while they fall short of it*." This implies that there is some reason against proving *the truth* of the charge in mitigation, which does not apply to evidence tending to prove, but falling short of proving it. The English cases of *Knobell v. Fuller*, and *Leicester v. Walter*, (*supra*,) and many other cases in this country, proceed upon the same idea. It seems to have been supposed that there was some sound legal objection, to admitting proof of facts under the general issue *in mitigation merely*, which, if specially pleaded, would amount to a full defense. But there is not, and never was, any such objection. It has been already shown that the rule which excludes proof of *the truth* of the charge in mitigation, had no such foundation.

We have now, I think, a clear view of one of the evils which required correction in this state. It was requisite either to re-

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store the ancient rule of the common law, and permit *any evidence* going legitimately to disprove malice, to be given under the general issue without notice, or to provide some mode by which notice might be given.

But there was another evil especially calling for the interposition of the legislature. Defendants might have avoided in some measure the injurious effect of the rule prescribed in *Underwood v. Parks*, as interpreted and enforced by the courts of this state, by putting in a plea of justification, and thus introducing their evidence, although it might not fully support the plea, for the purpose of having it considered by the jury in mitigation of the verdict. But here they were met by another rule somewhat gratuitously adopted by our courts. They held, not only that the putting in of such a plea, *when not done in good faith and with proper motives*, was an aggravation of the wrong, but that it was, under *all circumstances*, an admission of malice, and precluded the defendant from claiming any mitigation of damages on the ground of its absence.

I am at liberty to express my non-concurrence in this doctrine, because the legislature has abrogated it. In Massachusetts, where the courts had adopted the same rule, the legislature interposed long since. (*See Stat. of 1826, ch. 107, § 2.*) This statute, after providing that a plea of justification shall not be taken as evidence that the words were spoken, proceeds as follows: "Nor shall such plea of justification, if the defendant fail to establish it, be of itself proof of the malice of such words; but the jury shall decide upon the whole case, whether such plea was or was not made with malicious intent." Whether a plea of justification affords evidence of malice or not, must, as it seems to me, depend upon the state of the proof at the trial; and so our legislature, as well as that of Massachusetts, has evidently thought.

The evils, then, which called for the interposition of the legislature, were, as we see, two fold; and we are now prepared to put a construction upon the remedy which the code has provided. In *Graham v. Stone*, (6 How. Pr. R. 15,) an opinion

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is intimidated by Mr. Justice Johnson, that section 165 of the code does not authorize any facts to be set up in an answer in mitigation of damages, except in connection with a justification of the libel or slander; and this view is concurred in by Mr. Justice Harris, in *Brown v. Orvis*, (6 How. Pr. R. 376.) I do not so interpret the provision. Under that construction, the matter would be left in no better condition than before. It would even be worse. Because, as the law stood before the code, the defendant might have pleaded a justification, although he did not expect to be able fully to support it, in the hope that his mitigating proof introduced under the plea might, as it generally would, have some influence with the jury, notwithstanding the *judicial* rule that he had thereby confessed the malice of the charge. But as he may now be required to put in his answer under oath, he would, upon the construction given to section 165, be deprived of every resource, unless his belief in the truth of the charge continued up to the time of putting in the answer.

To reach the evils which existed, therefore, a broader construction must be put upon the provision in question; and I see nothing in the phraseology of the section to prevent this. Its language is, that the defendant "may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances." This does not necessarily mean that he must connect them both together; that he cannot allege one without the other; but that he should not be prohibited from alleging either. Thus construed, this section exactly meets the evils to be remedied, and removes a reproach, which, as I think, with some justice, has been often cast upon the administration of the law of libel and slander by the court.

The facts set up in the answer in this case must, I think, if established by proof, have had some tendency to rebut the presumption of malice, and consequently to mitigate the damages; and therefore should, under the conclusions to which I have arrived, have been received in evidence. The judgment of the

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supreme court should be reversed, and a new trial ordered, with costs to abide the event.

JOHNSON, J., also delivered an opinion to the same effect as the foregoing opinions.

GARDINER, Ch. J., and EDWARDS and PARKER, Js., concurred.

DENIO, J., dissented on the ground that the rule of law as held by the supreme court in this case, whether a wise one or not, was too well settled to be changed except by the legislature, and that in his opinion this had not been done by the code of procedure.

Judgment reversed.

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*CATLIN against GUNTER.*

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A note, delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or himself, has no legal inception in his hands. If he negotiate the note upon an usurious consideration, it is void.

Where there was no direct evidence that an usurious agreement was made at the time of the loan; but it was proved that twenty-two days thereafter the borrower paid and the lender received for the use of the money, from the time of the loan to that day, a sum equal to interest at the rate of much more than seven per cent per annum; *Held*, that it was a question for the jury whether or not the loan was made upon an usurious agreement.

The provisions of the code of procedure on the subject of a variance between pleadings and proofs, are applicable to cases in which usury is alleged and sought to be established.

These provisions have changed the strict rule which formerly prevailed as to a variance in such cases.

Accordingly, where on the trial the evidence tended to prove an usurious agreement which differed from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the plaintiff gave no proof that he was misled thereby to his prejudice; *Held*, that the variance should be deemed immaterial.



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**APPEAL** from a judgment of the superior court of the city of New-York. The action was commenced in 1851, to recover the amount of a promissory note of which the defendant was the maker. It was dated February 24th, 1851, and was for the payment of \$819.68, in five months from date, to the defendant's own order, and was indorsed by him. The complaint after describing the note averred that the plaintiff was the lawful holder and owner of it, and that the defendant was justly indebted to him in its amount.

The answer admitted the making of the note, but denied that the plaintiff was the lawful holder or owner, or that the defendant was indebted to him to the amount of it. The answer then set up usury, in the following manner: It averred that on the 24th of February, 1851, the defendant made the note in suit, and two other notes, for the sums respectively of \$840.16, and \$590.16, and without consideration delivered them to T. M. Crandall, to have the same discounted; that Crandall delivered them to Silas Davenport together with four other notes, made respectively by F. A. Tallmage, L. Schlosser, W. Durbridge and Robert Hunter, for the respective amounts of \$150, \$117.50, \$750, and \$418.87, to raise money upon; that Davenport left the seven notes with W. A. Beecher as collateral security for the payment of the following loans made by Beecher to Davenport, namely, one of \$500 on the 18th of March, one of \$1000 on the 9th of April, and another of \$1300.75 on the 16th of May, in the year 1851, for which sums Davenport gave his checks on a bank in New-York; that upon each of these loans Davenport had agreed to pay Beecher interest at the rate of 18½ cents per day on each \$100, so long as the loan or forbearance continued. There was a reply taking issue upon the allegations in the answer.

The cause was tried in May, 1852, before the late justice Sandford, when the plaintiff gave in evidence the note declared on, and rested. The defendant called T. M. Crandall, who testified that he received the note in suit and three other notes from the defendant without consideration paid to him therefor, and delivered them to Davenport to raise money upon for the witness.

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The other notes last mentioned were one made by the defendant for \$736.93, one made by R. Heslewood for \$450, and one by Schlosser for \$117.50. In regard to the purpose for which the notes were given to him by the defendant, his testimony was as follows: "I was to give the defendant the money for his notes. There was no time mentioned when I was to give him the money, nor any particular money that I was to give him. The defendant was to have the money when he wished, and he had a right to call for the money at any time. I never paid the defendant for the notes. I would have paid the defendant if he had called for it, and I had got the money. The notes were for my benefit thus far, that I could use the money until the defendant called for it." Davenport was then examined on behalf of the defendant, and testified that he received the note sued on and the three other notes mentioned by Crandall from him, and delivered them to Beecher, to secure \$1500 which he borrowed of B. on the 18th of March, 1851, and for which he gave Beecher his check, which he calls a "memorandum check." As to the allegation of usury, he said: "I do not recollect of any specific agreement made at the time of this loan between me and Beecher. I had made several loans of him at several times previously, which were at eighteen pence per day on one hundred dollars." This testimony the court held to be immaterial, unless the plaintiff should connect it with the loan in question. Davenport further testified, that on the 9th of April, 1851, he paid Beecher \$500 on account of this loan of \$1500, and took back the defendant's note for \$736.93; and that at the same time he, the witness, paid Beecher \$51.88, "for the use of the \$1500 from the 18th of March, 1851, to that day, according to my memorandum, and gave Beecher a new memorandum check for \$1000." The plaintiff objected that this evidence was irrelevant and *not within the issue*, but the question of variance does not appear to have been decided at that time. It appeared that the plaintiff purchased the note, after it became payable, of Messrs. Bulkley & Clafin. After some other testimony not bearing upon the question of usury, the defendant rested, and the judge expressed

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his opinion that the defendant had failed to prove his defense, and directed the jury to find a verdict for the plaintiff for the amount of the note and interest. The defendant excepted, and there was a verdict and judgment for the plaintiff.

The judgment was affirmed at the general term, where the opinion was given by Duer, J., who placed the decision mainly upon the ground of variance. (For a report of the case in the superior court, see 1 *Duer's S. C. R.* 253.)

*A. Thompson*, for the appellant.

*C. P. Kirkland*, for the respondent.

JOHNSON, J. delivered the opinion of the court. The plaintiff's counsel insists, in the first place, that the note upon which this action was brought had a legal inception in the hands of Crandall. If this is so, no subsequent negotiation of it upon an usurious consideration could defeat the action against the maker. If this point should be decided against him, he then contends that there was no evidence of usury sufficient to have been submitted to the jury; but if wrong in this, he further maintains that the usurious contract which the evidence tended to prove, was so far variant from that set up in the answer, that it could not be rightfully received, and that upon this ground the ruling at the trial ought to be sustained.

(1.) The transaction between the defendant and Crandall is obscurely stated. It is, however, pretty apparent that the note was delivered to the latter to enable him to raise money by negotiating it. Whether he was to do this for the benefit of the defendant and as his agent, or whether the note was lent to him for his own accommodation, is not clear. But in either case, the paper did not become operative until it was passed away for value. There seems to me to be no foundation for the argument that Crandall purchased the note of the defendant, and the case is not within the reason of those decisions in which it is held that an exchange of notes constitutes them both busi-

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ness paper. (*Dowe v. Schutt*, 2 *Denio*, 621, and the cases cited.) The remark of the witness that he would have paid the defendant for the notes if he had called for it, and the witness *had got the money*, implies very strongly that the notes were to be used to raise money for the benefit of the defendant. He says, in terms, that the defendant received no consideration for the notes. If this is to be understood literally, it of course puts an end to the idea that the note had become operative when delivered to him. If he means only to negative the fact of payment in money, and to have it understood that he made some engagement which was equivalent to his own note, and which would constitute a consideration for the transfer to him of the note in question, the arrangement should have been stated with such perspicuity that the court could judge of its character and effect. Upon the testimony which was given, I am of opinion that the jury might rightfully have found that the note in question was delivered to Crandall to enable him to raise money upon it for the benefit of the defendant, or for his own accommodation.

(2.) The evidence of usury was sufficient to be submitted to the consideration of the jury. On the 18th March, 1851, Davenport borrowed \$1500 of Beecher, and the question is, whether this money was lent at an usurious rate of interest. Davenport was not able to deny positively that there was an agreement for illegal interest. He could not recollect. The case is pretty much as it would be if there was no direct evidence of the making of the contract. On the ninth of April, twenty-two days after the loan, Davenport paid, and Beecher received, \$51.88 "for the use of the \$1500 from the 18th March, to that day." This was some evidence of an agreement for a rate of interest which would produce that amount, coeval with the loan. I agree with the court below, that evidence of prior usurious loans would not alone affect this contract; but connected, as that evidence was, with the subsequent receipt of usurious interest for all the time which elapsed between the loan and the receipt of that money, it made a case to be left to the jury. I do not say that they must necessarily have found that the loan was usurious,

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but only that the evidence was suitable to be submitted to them.

(3.) It is the remaining question which alone presents any difficulty. There is a wide discrepancy between the usurious contract set up in the answer and the one which the evidence tended to prove. According to the former, the note in controversy was negotiated, by being delivered, together with six other notes, which are described, as collateral security for the payment of three several sums of \$500, \$1000, and \$1300.75, lent at different times by Beecher to Crandall, at a rate of interest equivalent to 18½ cents per day on \$100. According to the testimony, this note and three others, only one of which corresponds with any of the six notes mentioned in the answer, were transferred as security for one sum of \$1500 loaned on the 18th March, 1851, to Crandall by Beecher; and the rate of interest indicated by the evidence would be something over twenty-two cents per day on \$100, instead of the rate mentioned in the answer. There is a correspondence between the allegations and the proof to this extent: they concur in the position that the note in suit was transferred by Davenport to Beecher with other notes, as security for a loan made by the latter to the former, which loan was at an usurious rate of interest, and in respect to which Davenport also gave to Beecher his check on a bank. The point as to the variance I understand to have been made by the objection which the defendant took, that the proof was not within the issue in the cause. If the code of procedure has not changed the rule which is to govern this case, the court below was clearly right in holding, as it did, that there was a fatal variance. The cases are uniform and consistent, and several of them are referred to in *Rowe v. Phillips*, (2 Sandf. Ch. R. 14.) The code, however, contains provisions on the subject of variances, applicable to all actions; and if they establish a different rule from the one recognized in these cases, we are bound to apply it, though thereby the plaintiff may suffer loss, which by the defendant's slip in pleading he would have avoided under the former rule. It is provided, in the first place, that no variance

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between the allegation in a pleading and the proof shall be deemed material, unless it shall *actually* have misled the adverse party to his prejudice in maintaining his action or defense. (§ 169.) Then, it is not left to the judgment of the court whether, in a given instance, it was calculated to mislead, and from thence to hold that it did mislead; but whenever it is alleged that a party has been misled, that fact must be *proved* to the satisfaction of the court, and the proof must show in what respect he has been so misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just. (*Id.*) Where the variance is not material as above provided, namely, when the party has not proved that he has been actually misled, the court may either direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (§ 170.) But if an allegation is unproved, not in some particular or particulars only, but in its *entire scope and meaning*, it is not to be deemed a case of variance, but a failure of proof. (§ 171.) These provisions introduce a principle unknown to the former practice, namely, that of determining this class of questions, not by the incoherence of the two statements upon their face, and hence inferring their effect upon the state of the preparation of the party, but by proof *aliunde*, as to whether the party was actually misled, to his prejudice, by the incorrect statement. In this case the plaintiff did not offer any proof of the character suggested, nor did he even allege that he had been misled. He put himself upon the principle of the old rule, by alleging that the usurious contract set up in the answer was different from that indicated by the proof, and hence insisting that the proof was not within the issue. If then the discrepancy was a variance, as defined by these provisions, it should have been regarded as immaterial; and the only question is, whether it was a fault of that character, or a failure of proof as defined by section one hundred and seventy-one. What was the "scope and meaning" of the allegation of usury in the answer? In general terms, it was that the note was negotiated at its inception upon an usurious consideration.

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Such a general allegation in an answer, it is conceded, would be bad for its generality. But certain particulars were added, which were true: the name of the party to whom the note was passed was given; the general character of the transaction was stated, to wit, that it was delivered to that person with other notes, as collateral security for a loan of money, and the name of the borrower was correctly stated. To this was added the fact, with which the evidence corresponded, that the loan was evidenced by the check of the borrower. Then certain circumstances were stated, which have already been mentioned, which the evidence did not confirm, but disproved; that is to say, the particular additional notes transferred for the same purpose, the number of the loans, and the amount, and the rate of the usurious interest. In my opinion, these circumstances were accidental merely, and did not constitute the entire scope and meaning of the allegation, in the sense of the provisions of the code.

We are not, I conceive, warranted in applying a different rule to the defense of usury, from that which we would hold applicable in other cases. It is a defense allowed and provided by law. The defendant, in seeking to avail himself of the evidence, notwithstanding the variance, did not claim an indulgence from the court, but simply asked for the application of those rules which the legislature has provided for all cases indiscriminately, whether the party invoking their exercise was seeking to visit his adversary with a forfeiture or not. The law has not made any distinction between such defenses and those where no forfeiture is involved, and the court can make none. If the sense of the legislature is plainly expressed, as it seems to me to be, we have no judgment to pass upon the policy of these provisions. It is apparent, that in many cases the record will not furnish a true account of the issue actually tried and determined, and I can foresee some difficulty when it shall be necessarily used as evidence of a former judgment. Perhaps some of the inconveniences which might be expected to ensue may be avoided by the provisions of section one hundred and seventy-three, by which the courts are authorized, even after judgment, to conform the

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pleading to the facts proved. But, however this may be, we cannot dispense with the new rule which the code has established. I cannot doubt that the difficulty under which the defendant labored in this case was a variance merely, which, not having been proved to have misled the defendant, should have been considered immaterial. The judgment should be reversed, and a new trial ordered in the superior court.

Judgment accordingly.

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**PALMER, supervisor, &c. and others, *against* THE FORT PLAIN  
AND COOPERSTOWN PLANK ROAD CO.**

Section 1 of chapter 898, of the laws of 1847, does not repeal or modify section 26 of the general plank road act, (*Chapter 210 of Laws of 1847.*)

The two sections are to be construed together in determining the power of the supervisor and commissioners of highways to contract with a plank road company, as to its taking and using a highway of the town for the construction of its road.

They have authority to agree with the company, upon the compensation and damages to be paid for taking and using the highway, and to grant the right to do so.

But they have not power to grant the company this right on condition that it shall erect and maintain its toll gates in specified localities.

Nor are they authorized to make a contract with the company granting it this right and, as a consideration therefor, obligating it not to locate and maintain a toll gate within a specified limit.

A naked condition inserted in a grant does not create any agreement on the part of the grantee accepting the thing granted, to perform the condition.

In such a case, specific performance cannot be enforced by action. The remedy for a breach of the condition is by a proceeding to recover the thing granted. Accordingly, where the right to take and use a highway for the construction of a plank road, was granted to a company upon condition that it should not maintain a toll gate within certain limits; and the company, by virtue of the grant, took possession of the highway but afterwards violated the condition, and an action was brought to compel the company to observe it; *Held*, that the action could not be sustained.

The supervisor and commissioners of highways of a town cannot maintain a



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suit in their joint names as such officers, on a contract made by them on behalf of the town, which contains no express agreement with them, as such officers.

IN November, 1848, the defendant, a plank road company, organized under the general plank road act, applied to the board of supervisors of the county of Otsego, for leave to lay out and construct its road, and to take the real estate necessary for the purpose; which leave was granted, and commissioners were appointed to lay out the road.

In 1849, the directors of the plank road company entered into an agreement with the supervisor and commissioners of highways of the town of Otsego, of which the following is a copy, viz: "The subscribers, the supervisor and commissioners of highways of the town of Otsego, in the county of Otsego, hereby agree to and with the Fort Plain and Cooperstown Plank Road Company, in consideration of the public benefit to result therefrom, and in pursuance of an act in relation to plank road companies, passed November 24, 1847, to grant and allow to said company the right to take and use any part of any public highway in said town, necessary for the construction of their road, according to the provisions of the law in such case made and provided. But this release is executed on the express condition, that no gate shall be erected on said road, demanding tolls, within three miles of the court house in the village of Cooperstown; and in case any such gate or gates shall at any time hereafter be erected on said road by said company, then and in such case, and from thereafter, this lease to be void and of no effect.

(Signed) SETH DOUBLEDAY, Supervisor.

PHILANDER WATERMAN,	} Commissioners
WILLIAM KINNE,	
JOHN C. WILLIAMS,	

of highways.

E. STILLWELL,	} Directors of the Fort Plain and
GEORGE YOST,	
H. E. WILLIAMS,	

Cooperstown Plank Road Co."

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The plank road company in April, 1850, commenced the construction of its road within the village of Cooperstown, in the town of Otsego, and constructed the same northerly upon and along a highway of said town about five and one-half miles; such road was completed about the first of August, 1850, and on the 5th of that month the company erected a toll gate on the road about half a mile from the court house and exacted toll from persons traveling upon it. In July, 1850, the defendant, pursuant to sections 12 and 26 of the act of May 7, 1847, presented a petition to the county judge of Otsego, stating that the line of its road, as established by the commissioners, would pass upon and along said highway in the town of Otsego, and that it had been unable to agree with the supervisor and commissioners of highways of such town, upon the compensation to be paid therefor; and praying that such compensation and damages might be ascertained by a jury. The county judge directed a jury to be drawn pursuant to the prayer of the petition. Upon the drawing of the jury, counsel appeared in behalf of the town of Otsego, and presented and urged the agreement aforesaid as an objection to the proceedings. The objection was overruled by the county judge, and the jury drawn. The same objection was made and overruled at the meeting of the jury to assess the damages. The counsel for the town, notwithstanding their objection, took part in the proceeding, and argued the matter before the jury. The damages were, on the 22d of August, 1850, assessed at \$20. After this assessment the town, by its counsel, made a motion in the supreme court to set aside the verdict of the jury and for a new trial, which motion was denied. The defendant paid the twenty dollars to one of the three commissioners of highways, who, however, had no authority from his associates to receive it. Thereupon the plaintiff Palmer being supervisor, and the other three plaintiffs being commissioners of highways of the said town of Otsego, describing themselves as such officers, brought this suit to compel the defendant to remove its gate, and to observe the condition contained in the agreement above set forth.

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The cause was tried before Mr. Justice Shankland, without a jury, at the Otsego county circuit. Upon the trial the foregoing facts appeared; and the said justice found, as matter of fact, that the defendant executed the contract above set forth, and entered upon and took possession of the highway therein mentioned, for the use of the plank road company by virtue of that contract, and by no other authority; that the town or its officers had not received the damages assessed by the jury for the taking and use of the road, or done any act to waive their right under the contract; that the defendant had violated the contract, by erecting and keeping up a toll gate on its road within one-half of a mile from the court house in Cooperstown, and exacting toll thereat contrary to the contract. He also found that the defendant instituted the proceedings, and had the damages assessed for the taking of the road as above mentioned; and he ruled and decided that the defendant had no right to erect and maintain a gate on its road and exact toll thereat, within three miles of the said court house, and ordered judgment for the plaintiffs, requiring the defendant to remove its gate three miles from the court house, and perpetually restraining the defendant from erecting any gate on its road within that distance. To this ruling, decision and judgment, the counsel for the defendant in due form excepted. The judgment was affirmed by the supreme court at a general term held in the sixth district, and the defendant appealed to this court,

*A. C. Paige*, for the appellant, submitted the following, among other points: I, The supervisor and commissioners of highways have no authority at common law, or under any statute, to maintain this action. (*Cornell, &c. v. The B. & O. T. Co.*, 25 *Wend.* 865; *Cornell, &c. v. Town of Guilford*, 1 *Denio*, 510. *This latter case was affirmed in the court of errors.*) They have no authority to maintain this action under any statute. The cases of *Cornell, &c. v. The B. & O. Turn. Co.* and *Cornell, &c. v. Town of Guilford*, decide that no statute in force at the date of those decisions conferred any such authority. The only rem-

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edy given by statute for an obstruction of a highway was an action for the penalty of treble damages, to be sued for by the commissioners of highways. (1 *R. S.* 526, §§ 130, 131.) Since the decision of the cases above cited, no statutes have been passed authorizing the plaintiff to bring this action. No such authority is conferred by any provision in the plank road acts. (*See Act of May 7, 1847, p. 223, § 26; p. 226, § 37; Act of Nov. 24, 1847, p. 496, § 1.*) In the absence of a common law remedy, a party is confined to that given by the statute. (25 *Wend.* 367, 368.) The only remedy given by the statute in this case, is the implied prohibition of the company to enter and take possession until the damages are paid. (§§ 26, 28, 29, and 30, of *Act of May 7, 1847.*) Section 92 (2 *R. S.* 473, 1st ed.) does not authorize the plaintiffs to maintain this action. That section authorizes supervisors, commissioners of highways, &c. separately, not jointly, to bring actions on contracts lawfully made with them, &c. in their official character, and to enforce any liability to such officers, or the body they represent, &c. The instrument in writing set forth in the complaint was not lawfully made; it was not authorized by the 26th section of the act of May 7, 1847; it was not an agreement fixing the compensation and damages to be paid, &c., the only agreement authorized to be made by that section; it did not create any liability on the part of the defendant to the plaintiffs as town officers, or to the town. It is not a contract, but a release or grant by the supervisor and commissioners of a right to take and use the highway upon condition, &c. The defendant did not undertake or agree to do any thing. (25 *Wend.* 367, 368; 1 *Denio*, 513, 514.) If a contract and a right of action can be maintained upon it, such action must be brought in the name of the town; no express authority having been conferred upon the plaintiffs to bring the action in their names of office. (1 *R. S.* 356, 357, §§ 1, 2, 3, 1st ed.; 1 *Denio*, 512 to 516.)

II. The instrument in writing set forth in the complaint is void, and not binding upon either the town of Otsego or its supervisor and commissioners of highways, or the defendant; and

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no specific performance of it can be adjudged. Such agreement was not authorized to be made by the plank road acts. Section 26 of the act of May 7, 1847, (*page 223*,) only authorizes the supervisor and commissioners of highways to agree with the company upon the compensation and damages to be paid for taking and using a public highway for the purposes of its plank road. It does not authorize these officers to release and grant to the plank road company the public right to the highway without a pecuniary consideration, nor to convey such public right upon condition. The consideration must be *compensation and damages*, to be paid to the commissioners, to be expended in improving the highways of the town. The act of November 24, 1847, (§ 1, *p. 496*,) does not modify the 26th section of the act of May, 1847; it merely, on the company's obtaining lands, &c. by purchase or gift, and making an agreement fixing the compensation for the use of highways authorized by said 26th section, dispenses with the application to the board of supervisors for authority to lay out and construct the plank road required by the 4th section of the act of May 7, 1847. The act of November 24, 1847, has no application to this case, as it is limited in its application to cases where the plank road company had not previously made an application to the board of supervisors, &c. The defendant made such application to the board of supervisors on the 15th of November, 1848; and the agreement in question was not executed until ten days before the town meeting in 1849. Statutes conferring powers on local officers must be strictly construed, and a strict compliance with the statute by such officers is required. (20 *Wend.* 207; *Webb v. Albertson*, 4 *Barb.* 51.)

III. The instrument in writing, in question, created no contract between the parties. 1. There is no covenant or agreement on the part of the defendant not to erect a toll gate within three miles of the court house, &c. The instrument is merely an assignment or grant of the public right to the highway, upon condition subsequent, without covenants by either party. (*Cruise Deed*, *ch. 4*, §§ 34, 37; *ch. 7*, § 21; *Id. tit. 24, Ways*, §§ 1, 7.) 2. Where there is a conveyance or grant of an estate or interest

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in, or arising out of or annexed to land, upon condition, without any covenant by the grantee to observe and perform the condition, the condition, although the conveyance or grant is executed by the grantee, cannot be regarded as a covenant; and the only remedy of the grantor in case of a breach of the condition is to enforce a forfeiture of the estate or interest in the premises. (*Livingston v. Stickles*, 8 *Paige*, 398, 402; *Stuyvesant v. Mayor, &c. of N. Y.*, 11 *id.* 414, 422, 425, 426.) 3. There being no covenant or agreement on the part of the defendant not to erect a toll gate within three miles of the court house, &c., there is no contract in this case for a court to decree to be specifically performed. This objection is fatal to the action of the plaintiffs. (8 *Paige*, 398, 402; 11 *id.* 425, 426; 2 *Story's Eq. Juris.* § 712 *et seq.*; 6 *Paige*, 288; 5 *Hill*, 256.)

*J. K. Porter*, for the respondent, among others, insisted on the following points: I. The *supervisor and commissioners of highways* may agree with a plank road company, in writing, to be filed and recorded in the town clerk's office, upon the compensation for taking and using any highway, &c. (*Blatchford's Gen. Statutes*, 584, § 26, *Laws of May 7, 1847.*) Any plank road company may "procure by agreement," from the officers named in said 26th section, "the right to take and use any part of any public highway necessary," &c. (*Blatchf. Gen. Stat.* 591; § 1, *Laws of Nov. 24, 1847.*) This statute is general, empowering the supervisor and commissioners to make *any agreement* by which the company may procure the right to take any part of any highway. It refers to the act of May 7, 1847, to designate the officers empowered to make the agreement. The agreement was executed in the manner prescribed by statute, giving those officers power to make it—was in writing, and filed and recorded in the town clerk's office. This was all the statute required, and was a full compliance with all the law on the subject, and renders the contract binding on all parties. The grant of *power* to the supervisor and commissioners to make such an agreement, necessarily implies and confers the power to enforce

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it upon those officers, or the law itself must be a nullity. (See *Supervisor of Galway v. Stimson*, 4 Hill, 136.) Again, 2 R. S. 473, § 92, expressly authorizes commissioners of highways to bring actions "upon any contract lawfully made with them or their predecessors in office, in their official character, to enforce any duty enjoined by law to such officers, or the body which they represent." This action was correctly brought in the names of the supervisor and commissioners of the town officially. But the defendants have waived all objections, "that plaintiffs have not legal capacity to sue," or, "that there is a defect of parties, plaintiffs," by not demurring. (Code, § 144, subs. 2, 4; *Id.* § 148.)

II. Plank road companies are prohibited by express statute from *entering upon*, taking and holding a public highway for their use, till they have acquired the right to do so, by the assessment of damages by jury, and their payment or tender and deposit; (*Blatchf. Gen. Stat.* 581, § 11; *Id.* 584, § 26; *Id.* 585, §§ 28 and 30;) or till they have obtained the agreement or license of the town officers, as provided by section 26 of law of May 7, 1847, and of section 1, law of November 24, 1847. (*Blatchf. Stat.* 591.) The company obtained such agreement or license from the town officers of Otsego; entered upon the public highways of Otsego, as provided by it; used and occupied them from April till August, 1850, and till after they had constructed and finished the road and erected their gate, and received tolls for its use by the public; took and were in actual enjoyment of all the rights they could take by such agreement, without having obtained any such right under any other provisions of the statute. The order of the board of supervisors gave them no such right. Therefore they must have taken possession under that agreement, and acted upon it. The court have so found as a question of fact, and that is conclusive. (*Bloodgood v. M. & H. Railroad*, 14 Wend. 56; *Estes v. Kelsey*, 8 *id.* 555, 558.)

III. By entering into that contract with the town officers, acting upon it, and entering upon and taking possession of the

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public highways of the town under it, the company is estopped from alleging title or right from any other source as against the town, their first grantor. (*Jackson and others v. Hinman*, 10 *John*. 292; *Brant and others v. Livermore*, *Id.* 358; *Jackson and others v. Ayres*, 14 *Id.* 224.)

IV. The company had no right to violate the condition of this agreement, and then avail themselves of the void clause to avoid the contract or excuse its breach. "The condition does not defeat the estate although it be broken, until entry by the grantor or his heirs, and when the grantor enters he is in as of his former estate." (4 *Kent's Com.* 2d ed. 126, 7, 8.) The right to abandon a contract, rests only in the party who has been guilty of no fault, and by him it must be exercised in a reasonable time. (*Chitty on Contracts*, 742, and note 3; 1 *U. S. Digest*, 540, § 60, and cases cited.) On agreements to convey land on payment by vendee, and if vendee fail to pay, the contract to be absolutely void, and on failure to pay by vendee, held that an action lay to enforce the contract and compel payment. Such contracts being void only at the election of the grantor. So also, if the contract contain a general provision that if vendee fail to perform it shall be void. It is void only at the election of the vendor. (*Canfield and others v. Wescott*, 5 *Cowen*, 270, and cases cited in note A, *Mancius v. Sergant*, and *Church v. Ayers*.)

V. "Where an estate is granted upon condition, the taking possession of the land to which the condition is annexed, binds to the performance of the condition, even though such performance should be attended with loss." (2 *Cruise's Digest*, 26, §§ 15, 16, 17, and cases cited.)

VI. The contract in this case was mutual. The town officers agree "to and with" the plank road company, to grant and allow said company to take and use the public highways, &c.; and declares that it is *executed* on the express condition that *no gate shall be erected*, &c. by the company. The company *executed* it with the town officers. It was a contract fully executed by the parties, as they understood it, before any attempt to avoid it



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by the company. Its *execution* is full evidence of *intention* to be bound by it. (7 *Coven*, 484.) As to mutuality, see *Chitty on Con.* 14 to 17; *Carpenter v. Nixon*, (5 *Hill*, 260, and case cited.)

SELDEN, J. The most important, among the numerous questions this case presents, is, whether the supervisor and commissioners of highways of the town of Otsego had power to enter into the agreement which lies at the foundation of the suit. By section 26 of the act to provide for the incorporation of plank road companies, passed May 7, 1847, these officers are authorized to agree with such companies "upon the compensation and damages to be paid by said company, for taking and using any of the highways of the town;" and by section 1 of the act in relation to plank road companies, passed November 24, 1847, such companies are authorized to "procure by agreement," from the same officers, "the right to take and use any part of any public highway necessary for the construction," &c.

At first view, it might seem, that the power to "procure by agreement" the right to use the necessary lands, must include the power to agree upon the terms upon which such right should be acquired. But there are many things to be considered before this conclusion is adopted as applicable to the present case. By a careful scrutiny, it will be seen, that section 1 of the act of November, 1847, was not designed either to repeal or modify section 26 of the previous act. Under the first act, a plank road company, notwithstanding it might have agreed with the officers of a town upon the compensation to be paid for the use of any of the highways of such town, and might also have obtained by agreement the right to all private lands along the line of its road, was still required to apply to the board of supervisors for leave to lay out and construct its road, and thus to subject itself to all the delay and expense attending the appointment and action of commissioners to lay out the road. The officers of towns, although authorized to agree upon the amount of compensation for the use of highways,

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were not authorized to grant the right to such use. Section 1 of the act of November, 1847, was plainly intended to remedy this inconvenience, and to relieve plank road companies from the unnecessary burden. The two sections, therefore, are to be taken together, in determining the extent of the powers conferred upon the supervisor and commissioners. Section 1 of the last act gives the power to grant the right to use the highways of the town, and section 26 of the former, to agree upon the amount of compensation. The two sections, when united, specifically confer these powers and no other.

It is a general rule that public officers, acting under a statutory authority, must confine themselves strictly within the powers conferred by the act. This rule has been recognized and applied by the supreme court at general term, in the second district, in a case in principle not unlike the present. (*See Webb v. Albertson*, 4 Barb. S. C. R. 51.) It seems that the village of Greenport upon Long Island lies within the limits, and is a part of one of the towns in the county of Suffolk. Some of the inhabitants of the village, being desirous to have one of the streets therein extended and opened, applied to the commissioners of highways of the town, who alone had power to make the improvement. The commissioners consented to do it, but took a bond from the applicants, to indemnify the town against the expenses; and the action was upon this bond. Upon demurrer it was held, that the action would not lie; that the commissioners were authorized to lay out and open the road, if in their judgment the public convenience required it; but not, as the learned judge who delivered the opinion expresses it, "to be tampering with parties, and making conditions." Much of the reasoning in that case is applicable to this. There are other objections to the existence of the power exercised by the supervisor and commissioners of highways in this case, growing out of the provisions of the plank road acts themselves. The power to agree, that no gate shall be located within a given distance of a certain point, involves the power to agree where the gate *shall be* located. I can see no ground for distinguishing between

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these different exercises of power. But section 37 of the first plank road act provides, that the commissioners of highways of any town, "*whenever* they, or a majority of them shall be of the opinion that the location of such gate is unjust to the public interest," &c. may apply to the county court for an order to change the location. This is a power which may be exercised *from time to time*. Changes may occur in the highways of the town, rendering such an application necessary. If, however, the location of the gate is fixed by contract between the company and the town, this remedy is cut off. Because, if the plank road company is bound by such a contract, the town must be bound also.

But there is a still stronger objection to the condition, annexed by the supervisor and commissioners in this case to their grant. It interferes with and changes the tenure by which the plank road company hold the right to the use of the highway as prescribed by statute. Sections 28 and 30 of the original act provide, that whenever the proceedings by the company, to acquire the right to use any lands or highways for the purpose of their road, shall be perfected, the company may enter upon and take and hold such lands, "*so long as the same shall be used for the purposes of such a road ;*" and section 3 of the act of November, 1847, provides, that whenever any such company shall have procured by agreement, under the provisions of that act, the right to take and use the parts of any public highway, "*it shall possess the same rights and privileges,*" &c. &c. as if the right had been acquired by the proceedings prescribed by the previous act. There is, therefore, a direct conflict between the condition annexed to the grant in this case, and the provisions of the plank road acts. The latter say, that *whenever* the company shall have acquired the right to use a highway, they may continue such use *so long as its road shall continue*. This condition says, that the right shall cease, if the condition is disregarded. I can see no answer to this objection.

But conceding the agreement to be valid, the case presents the question, whether a bare naked condition, contained in a deed, unaccompanied by any words importing an undertaking to abide

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by or perform it, can be enforced as a covenant. If this action can be sustained, the validity of the agreement being admitted, then every condition inserted by the grantor in a deed creates a covenant on the part of the grantee, as well as a condition; because it is impossible for an instrument to be more bald of any language importing an agreement to perform a condition, than the present. It is a little surprising that the cases on this subject, are not more numerous. The question seems to have rarely arisen, especially in modern times. It seems, however, to be settled by the older authorities. Littleton, in his work upon tenures, in treating of estates upon condition, says: "Also, if the words were such; provided always that the aforesaid B. do pay, or cause to be paid, to the aforesaid A. such a rent, &c.; or these: so that the said B. do pay, or cause to be paid, to the said A. such a rent, &c.; in these cases, without more saying, the feoffee hath *but* an estate upon condition; so as, if he doth not perform the condition, the feoffor and his heirs may enter." Coke, in his commentary upon this passage, says: "Our author putteth his case, when a proviso cometh *alone*. And so it is, if a man by indenture letteth lands for years, provided always, *and it is covenanted and agreed*, between the said parties, that the lessee should not aliene; and it was adjudged, that this was a condition, by force of the proviso, and a covenant *by force of the other words*. (Coke Litt. 203 b.) There is a distinction, therefore, between the case of a naked condition, without covenant, and that of a condition connected with a covenant. Comyn says: "But where words do not amount to an agreement, covenant does not lie; as if *they are merely conditioned to defeat the estate*." (Com. Dig. tit. Covenant, A. 3.) Bacon asserts the same doctrine, and refers to the case of *Geery v. Reason*, (Cro. Car. 128; see Bac. Ab. tit. Covenant, A.) The case in Croke was this: Geery, the plaintiff, had demised to Reason certain rooms in Bear alley, until midsummer, upon a rent of £6. 13s. 4d. The lease contained the following clause: "Provided and *upon* condition that the said Reason shall gather the rents of other the plaintiff's tenements, in Bear alley, re-

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served quarterly, and mentioned in a schedule, and pay the same within twenty days after every quarter day; and it is agreed, that the said Reason shall retain the rest of the benefit to be made of the said rooms, over and above the said six pounds thirteen shillings and four pence per annum, for his pains in gathering up the said rents." The plaintiff brought an action of covenant, for not collecting and paying over the rents mentioned in the schedule. The defendant demurred; and the court held, unanimously, that the clause in the lease did not constitute a covenant, but only a condition, upon the non-performance of which the estate was forfeited; and gave judgment for the defendant. It is clear from these authorities that there may be a condition without a covenant; and that where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. This doctrine was repeatedly recognized by the late chancellor; although, in the cases before him, he held, that the clauses upon which the questions arose, contained covenants as well as conditions. In *Livingston v. Stickles*, (8 *Paige*, 402,) he says: "The objection that the lease contains no covenant on the part of the lessee, or his assigns, to pay the tenth sale, so as to render them personally liable upon an alienation of the premises, with the consent of the lessor, does not appear to be well taken. If it were a mere condition, then it is evident the only remedy of the lessee would be by a proceeding against the purchaser to recover the premises, for a breach of the condition. But a clause of this kind may be so framed as to operate both as a covenant and as a condition." Again, in *Stuyvesant v. The Mayor &c. of N. Y.*, (11 *Paige*, 414,) the same question arose, and was treated in the same way.

But upon principle, independent of all authority, it would seem impossible to come to any other conclusion. It by no means follows, because a grantee consents to take an estate subject to a certain condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined, in which one would be willing to risk

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the forfeiture of the estate, while he would be altogether unwilling to incur the hazard, of a personal responsibility in addition. The doctrine which the plaintiffs in this case are driven to maintain is, that to assent to the condition is to assent to the personal liability; that the one involves the other. I can see no sufficient ground for such an assumption. The two things are essentially distinct, and involve risks different in nature as well as degree. How can it be said, then, that to assent to the one, is to assent to the other. The action must have failed upon this ground, had the agreement been valid.

There is still another objection which, in my view, is equally fatal to the action in its present form. It is difficult to conceive upon what principle, independent of some express statutory authority, the supervisor and commissioners of highways of a town can *unite* in the prosecution of a suit in behalf of such town. There is no community of interest or of office between them. They cannot be said, in any proper sense, jointly to represent the town or its rights and interests. Their union as plaintiffs is incongruous and repugnant to the plainest principles of law, unless authorized by some legislative enactment. Besides, neither jointly or separately can these officers, or either of them, sue in their own names, in behalf of their towns, except in those cases where they are expressly authorized by statute. A town is a political corporation, and suits in its behalf must be prosecuted in the name of the town. (*Cornell and Clark v. The Town of Guilford*, 1 *Denio*, 511.) But it is supposed that sec. 92, (2 *R. S.* 473,) which provides, that actions may be brought by supervisors and other officers, including commissioners of highways, "upon any contract lawfully made with them or their predecessors, in their official character," affords an authority for this action. It will be readily seen, however, that the contract in this case is not such as is contemplated by the provision referred to. The statute does not say, contracts made *by* these officers in behalf of their towns, but *with* them, that is, in their names. It was intended to provide for cases where these officers, in the performance of their appropriate official duties,

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should take from others contracts running in terms to such officers by their names of office.

Nothing of the kind exists here. There is no covenant or agreement running to these officers in terms. They, as the agents of the town, convey the right to use the highways upon a certain condition. It is virtually the act of the town through them. If any implied covenant arises upon the instrument, it is a covenant with the town, and must be enforced by and in the name of the town. It might be otherwise, if the instrument contained a covenant in express words, running in terms to the supervisors and commissioners. It is possible, though by no means clear, that in such a case the union as plaintiffs of these two separate, independent, quasi corporations, might, under the section referred to, taken either alone or in connection with sec. 113 of the code, be maintained. Taking this case, however, as it is, the action could not, I think, whatever view we might take of the contract, be supported in the name of the present plaintiffs.

The record presents several minor points; but as either of those already considered is decisive of the case, I deem it unnecessary to notice the others. The judgment should be reversed.

DENIO, JOHNSON, PARKER, EDWARDS and ALLEN, Js., were in favor of reversing the judgment on each of the grounds discussed in the foregoing opinion.

GARDINER, Ch. J., delivered an opinion in favor of reversal on the first ground discussed in the opinion of Selden, J., and concurred in his conclusions on the others.

Judgment reversed.

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Lorillard *against* The Town of Monroe.

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LORILLARD *against* THE TOWN OF MONROE.

The assessors and collector are not in any legal sense the agents of the town, in its corporate capacity, in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duties.

Accordingly, where land not situate within the town but in an adjoining county, was erroneously assessed by the assessors, and payment of the tax by the owner enforced by the collector of the town; *Held*, that the town was not liable in an action by the owner to recover the amount of the tax.

THE action was commenced by Lorillard in the supreme court against the town of Monroe, in the county of Orange, to recover about \$485, alleged to have been erroneously assessed as taxes upon lands owned by him, by the assessors of the town, and collected from him by its collector of taxes. The complaint alleged that from the year 1844 to 1850 the plaintiff owned a tract of uncultivated and unoccupied land of about ten thousand acres, of which about seven thousand acres were situate in the town of Monroe, Orange county, and about three thousand in the county of Rockland. That in the year 1844, and in each year thereafter to and including the year 1849, the defendant, by its officers and legal assessors of taxes, wrongfully and unlawfully assessed taxes upon the whole tract. The complaint specified the amount of the tax assessed in each year, and then averred "that the defendant, by its legal collectors of taxes for the several years aforesaid, wrongfully and unlawfully forced and compelled the plaintiff to pay, and the plaintiff did pay to such collectors, the said several amounts so assessed as taxes upon said tract, at such several times as the said collector demanded and forced the plaintiff to pay the same;" and claimed to recover the proportion of the whole tax assessed and paid in each year, which the portion of the land situate in Rockland county bore to the whole number of acres. The answer denied most of the allegations of the complaint, and insisted that the



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town was not liable for the wrongful and unlawful acts of the assessors.

The cause was tried at the Orange circuit, before Justice Brown. On the trial the facts were proved to be substantially as stated in the complaint. The defendant attempted to show that the tract was occupied by an agent of the plaintiff who resided in the town of Monroe, with a view to bring the case within the provisions in 1 R. S. 389, § 4, which authorizes an occupied farm or lot lying in two towns to be taxed in the town in which the occupant resides; but it turned out that the agent had only a charge and oversight of the land, and did not occupy it. The judge directed a verdict for the plaintiff, and the defendant excepted. The judgment rendered on the verdict was reversed at a general term of the supreme court sitting in the second district, and judgment given against the plaintiff for costs. (For a report of the case in the supreme court, see 12 Barb. 161.) The plaintiff appealed to this court, and the case was submitted on printed points.

*C. W. Sandford*, for appellant.

*Monell & Dunning*, for respondent.

DENIO, J., delivered the opinion of the court. If this action can be maintained, it will be, by assuming that the town is a corporate body, that the assessment and collection of taxes is a corporate act, and that the assessors and collectors of taxes, when performing their duties as such, are to be regarded as the servants and agents of the town as a corporation, and by applying to these premises the maxim of the common law that the master, or principal, is responsible for the acts of those he employs or appoints, while they are acting within the scope of their employment.

The several towns in this state are corporations for certain special and very limited purposes, or to speak more accurately, they have a certain limited corporate capacity. They may purchase and

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hold lands within their own limits for the use of their inhabitants. They may as a corporation make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and they may regulate and manage their corporate property, and as a necessary incident may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities shall require such proceedings. (1 R. S. 337, § 1 and seq.) In all other respects ; for instance, in every thing which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads and bridges, the relief of the poor, and the assessment and collection of taxes, the several towns are political divisions, organized for the convenient exercise of portions of the political power of the state ; and are no more corporations than the judicial, or the senate and assembly districts. (*Id.* § 2.) The functions and the duties of the several town officers respecting these subjects are judicial and administrative, and not in any sense corporate functions or duties. The imposition and collection of the public burthens is an essential and important part of the political government of the state, and it is committed in part to the agency of officers appointed by the local divisions called towns, and in part to the officers of the counties, upon reasons of economy and convenience ; and the official machinery which is organized within the towns and counties is public in the same sense as is that part of the same system which is managed by the state officers residing at the seat of government, and whose operations embrace the whole state. It is a convenient arrangement to have the assessors chosen by the electors of the towns within which they are to perform their duties, for the reason that the people of these small territorial divisions will be most likely to know the qualifications of those from among whom the selection is to be made. When chosen, they are public officers, as truly as the highest official functionaries in the state. Their duties in no respect concern the strictly corporate interests of the towns, such as their common lands and their corporate personal proper-

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ty, or the contracts which as corporations they are permitted to make, nor are their duties limited to their effects on the towns as political bodies. The description and valuation of property for the purposes of taxation, which they are required to make, form the basis upon which the state and county taxes are imposed; and although money is raised by the same arrangement to be expended within the towns, the purposes for which it is to be employed are as much public as are those for which the state and county taxes are expended. I am of opinion, therefore, that the assessors and collectors of taxes are independent public officers, whose duties are prescribed by law, and that they are not in any legal sense the servants or agents of the towns, and that the towns as corporations are not responsible for any default or malfeasance in the performance of their duties.

It is not alleged in the complaint, and was not proved on the trial, that any part of the money which was collected from the plaintiffs was paid to the town, or into its treasury, nor could such an allegation be true consistently with the legal provisions on the subject of taxation. The collector is directed by his warrant to pay separate portions of the money to the supervisor, commissioners of highways, superintendent of common schools and overseers of the poor, and the residue to the county treasurer. (*Id.* p. 396, § 37.) The town, as such, has no treasury, and the town officers who are thus to receive and disburse this money, are coordinate with the assessors and collectors, holding their offices by the same mode of appointment, and regulated by the same public law.

We have not been referred to any authority where a similar action has ever been sustained in this state. In the case of *Preston v. The City of Boston*, (12 Pick. 7,) the tax which the plaintiff had been illegally compelled to pay, was paid by him to the treasurer of the city of Boston, and the action was for money had and received to the plaintiff's use. The city corporation, as such, had received the plaintiff's money, which was an essential feature, which is wanting in this case. Besides, that was the case of a city having full corporate powers, the offi-

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*Lorillard against The Town of Monroe.*

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cers concerned in imposing and collecting the tax, being corporate officers. In this case, the duty which is alleged to have been erroneously and illegally performed, was imposed upon the assessors and collectors, by a public statute, and not in any sense by the town. In *Martin v. The Mayor &c. of Brooklyn*, (1 *Hill*, 545,) the rule was laid down by the late Justice Cowen, that even a municipal corporation was not liable for the misfeasance or non-performance of one of its officers in respect to a duty imposed by the statute upon such officer, though it was conceded that if the duty had been imposed upon the corporation, as in the case of streets and sewers, which the corporate body was bound to repair, the rule would have been otherwise. It was upon the principle last referred to that the cases of *Delmonico v. The city of New-York*, (1 *Sandf. Sup. C. R.* 222,) and the *Mayor &c. v. Furze*, (3 *Hill*, 612,) were decided. Even where a person sustains an injury by means of the neglect of an officer of a municipal corporation to execute an ordinance of the corporation according to his duty, the corporate body is not liable to an action. (*Levy v. The Mayor &c. of the City of New-York*, 1 *Sandf. S. C. R.* 465; *Griffin v. The Same*, *MS. Court of Appeals*, *March term*, 1854.) *A fortiori* where the duty which has been violated was imposed by a public law of the state, the corporation, though it had the appointment of the officer, would not be liable. The judgment should be affirmed.

Judgment affirmed.

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*Barber against Cary.*

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*BARBER against CARY.*

By the common law, where a power was to be executed with the consent of third persons, the death of one of such persons before consent given, rendered the execution of the power impossible.

This rule of law has not been changed by the revised statutes. Section 112 (1 R. S. 785) is applicable to grantees of a power, not to third persons whose consent is requisite to its execution.

Accordingly, where land was devised to a son for life and then to his heirs, with power to him to sell and convey the same, by and with the consent of his mother and brother, and she died without consenting, and the son afterwards, with the consent of his brother, sold and conveyed the land; *Held*, that no title passed by virtue of the power.

ANSON CARY died on the 8d of May, 1842, leaving a last will and testament, by which he devised certain lands to Albert G. Cary, during his life and to his heirs, with a power to the said Albert G. Cary to sell the same, by and with the consent of his mother, Hannah Cary, and his brother, George A. Cary, the defendant. Hannah Cary died on the 9th of July, 1842, and before the execution of the power. On or about the 19th of July, 1843, Albert G. Cary conveyed said lands to said George A. Cary, in trust; one of the purposes of which trust was to sell the whole or a part thereof, and out of the proceeds to extinguish a judgment which was a lien on the land. The consent of George A. Cary was given to such conveyance, but was not expressed in the deed, nor certified in writing thereon, as required by statute. On the 4th December, 1846, the defendant conveyed a part of the lands to the plaintiff, who gave a mortgage thereon to William G. Sands. Sands assigned the mortgage to the defendant, who advertised the premises for sale on a statute foreclosure.

The plaintiff being advised that his title to the land was defective, because the consent of George A. Cary to the conveyance, by his brother Albert to himself in trust, was not expressed in or certified on the deed, as required by the statute, and being

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*Barber against Cary.*

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unable to raise money on the land to pay the mortgage on account of such defect, requested George A. to execute a formal consent, which was not done, and this suit was instituted against him to compel him to do so.

On the trial, before Justice Mason, at the Chenango circuit, the foregoing facts appeared, whereupon he ordered judgment against the defendant for the relief prayed. On appeal to the general term, sitting in the sixth district, this judgment was reversed, and judgment rendered against the plaintiff for costs. The plaintiff appealed to this court.

*Henry R. Mygatt*, for the appellant.

*W. N. Mason*, for the respondent.

GARDINER, Ch. J. The 122d section of the statute in relation to powers provides, "that when the consent of a *third* person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon. In the first case, the instrument of execution; in the second, the certificate shall be signed by the party whose consent is required; and to entitle the instrument to be recorded, the signature must be proved or acknowledged in the same manner as if subscribed to a conveyance of lands." (1 R. S. 736.) The defendant in this case sustained the relation of third person to his brother, the donee of the power, undoubtedly; but he was also the grantee in the conveyance, by which it was attempted to be executed. Whether this circumstance is to form an exception, from the general language of the statute, is the question to be determined. My conclusion is, that it does not. The power itself cannot be executed "except by some instrument, which would be sufficient in law to pass the estate, if the person executing the power were the actual owner," (*Id.* § 113;) and by the section already quoted, it was the purpose of the legislature, that evidence equally satisfactory of the consent, where that was necessary,

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*Barber against Cary.*

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should accompany or rather form a part of the instrument or conveyance. This evidence is wanting in the deed from A. G. Cary to the defendant. There is no writing showing the assent of the latter, but this is to be inferred, if at all, from his acceptance of the conveyance; a fact to be established by parol. But beyond the delivery, which is essential to give validity to an instrument executed in conformity with this statute, as in other cases, the legislature have said, that purchasers, and all others whose interests may be affected by the execution of the power, shall have a writing authenticated by the signature of the defendant in or upon the deed itself. There is nothing unreasonable in this. The testator, in this case, saw fit to clothe the defendant with a quasi power over his estate, by making his consent a condition precedent to its alienation; and the statute has prescribed the mode in which that power shall be exercised, and it must be substantially pursued. There is more reason for insisting upon compliance in the case of a deed creating a trust, than in those where the grantee takes a beneficial interest in the grant. In the latter case, an acceptance of the grant might be reasonably presumed from its advantageous character to the grantee; but such a presumption would scarcely apply to a trustee, upon whom an obligation was imposed, without any corresponding benefit to himself.

The conveyance subsequently made to the plaintiff by the defendant of a portion of the premises, subject to the power, will not help out the defect in the first deed. The power emanated from the testator, and when executed operated by relation on his estate. By his will, when read in connection with the statute, he authorized one of his sons to alienate the property described, with the consent of the other; the consent to be manifested in the manner prescribed by law. The grant to the plaintiff by the defendant might estop him, but would not prevent the other heirs from alleging that the power had not been executed in the manner prescribed by the testator and by the statute. His consent derived all its force from the will; his grant was his own act, and operated upon his interest in the land

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*Barber against Cary.*

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independent of the will. If there has not been a valid execution of the power, as I think is established, there does not appear to be any sound objection to the relief asked by the plaintiff. He was a purchaser in good faith, for a valuable consideration; and section 132 of the act referred to provides, "that purchasers, for a valuable consideration, claiming under a defective execution of any power, shall be entitled to the same relief in equity as similar purchasers claiming under a defective conveyance from an actual owner." All the parties to the sale intended an actual conveyance. The defendant gave his assent in fact; has never claimed otherwise, but has constantly affirmed the validity of the transaction to transfer the title.

We must assume the facts as found by the justice who first heard the cause. The supreme court at general term did not, as I understand their decision, differ from him in his construction of the testimony, but placed their decision upon the ground, first, that the death of the mother, without giving her consent, destroyed the power to alienate; and secondly, that the court would not in this or any case entertain a suit to oblige a person, having a discretion to exercise, to give his assent to a conveyance.

The second ground of reversal is obviated by the fact, that the discretion had been exercised; that the defendant had in fact deliberately given his consent by accepting the deed of trust, and acting under it. The statute evidence of his judgment expressed in another form was alone wanting; and this it was competent for the court to enable him to supply.

The other ground assumed by the supreme court is, as it appears to me, tenable, and a conclusive answer to the action. That the consent both of the defendant and his mother at the common law would have been necessary to a proper execution of the power, is conceded; and that her death, by rendering the performance of the condition impossible, would by consequence have annulled the authority altogether. But the counsel for the plaintiff relies upon the 112th section of the act to obviate the objection. It declares, "that where a power is *vested*



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Barber *against* Cary.

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in several persons, all must unite in its execution ; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." If this provision is applicable, it follows, that the persons whose consent is requisite are themselves clothed with the power, or according to § 185, the grantees of it. Such an hypothesis would abrogate the distinction between the executor of a power and a third person who consents to its execution, which runs through the whole statute. If both sustain the same relation to the power—in other words, if both are grantees, there is no reason for a distinction in the manner in which they are to execute it. The 113th section, however, provides that no power can be executed except by an instrument that would pass the estate if the person executing it were the actual owner, while the 122d section declares that the consent may be certified in writing on the instrument by which the power is executed. Again, only those who can alienate lands can execute a power, while there is no such restriction as to those who may consent to its execution. And lastly, if all are grantees as supposed, if Albert G. Cary had died, the power could have been executed by his mother and the defendant, under the 112th section. A construction which thus virtually denies the distinction in the authority of one empowered to sell lands, and of one who merely consents to such sale, must be unsound, and certainly is not sustained either by the common law or the statute. For this reason, I am of opinion that the judgment of the supreme court should be affirmed.

PARKER, J. If the will of Anson Cary had taken effect previous to the first of January, 1880, Albert G. Cary would have taken, under the rule in *Shelley's case*, a fee simple in the land in question ; but not having taken effect till after that time, the devise is subject to the provisions of the revised statutes, and under them Albert G. Cary took a life estate only in the land, and his heirs took the remainder as purchasers. (1 R. S. 725, § 28.)

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Barber against Cary.

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Albert G. Cary then took under the devise a life estate, with power to alien the same by grant, by and with the consent of Hannah Cary and George A. Cary. This was a general and beneficial power. The alienation might be made to any alienee whatever, and for the benefit of the grantee of the power alone. (1 R. S. 732, §§ 78, 79.) But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz. by and with the consent of Hannah Cary and George A. Cary. The first question is, whether the death of Hannah Cary, which occurred before the execution of the power, was fatal to the conveyance. The rule of law is well settled, that when the consent of third persons is required to the execution of a power, that, like every other condition, must be strictly complied with. (*Sugd. on Vendors*, 319; *Simpson v. Hawley*, *Prec. Ch.* 472.) If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God. (*Danne v. Annas*, *Dyer*, 219, *pl.* 8; *Frahelien's case*, *Mod.* 62, *pl.* 172; *Munsell v. Munsell*, *Wilmot*, 36.) So where the consent of several persons is required, the death of one of them destroys the power; for the consent of the survivor will not satisfy the the words of the power. (*Atwaters v. Birt*, *Cro. Eliz.* 856; *S. C.*, *Noy*, 38, *nom.* *Atwaters v. Bird*; *Butler v. Bray*, *Dyer*, 189 *b*; *Wilmot*, 56.)

There is no provision of the revised statutes that changes this well established rule of the common law. The counsel for the plaintiff argues that the following section of the revised statutes (1 R. S. 735, § 112) is applicable, and that one of the two persons whose consent was requisite having died, it was sufficient that the consent was given by the survivor. "Where a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." This section is applicable only to grantees of a power, not to the persons by whose consent it is to be executed. The per-

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*Barber against Cary.*

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son in whom the power is vested is called the "grantee of the power." (1 R. S. 138, § 135.) The person whose consent is required for its execution is called "a third person." (1 R. S. 736, § 122.) The power is in no respect vested in such third person. He can only consent to another's executing it. The argument which would bring this case under the 112th section involves the absurdity of calling Hannah Cary both a "grantee of the power" and a "third person;" and of holding that if Hannah Cary and Albert G. Cary had both died, the power might have been executed by George A. Cary as survivor; for that might be done under the authority of the 112th section, if all three were "grantees of the power."

That the 112th section is inapplicable to this case, is further apparent from section 113, which provides, that "no power can be executed, except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner." Now, Hannah Cary and George A. Cary were only authorized to give a consent—they were not authorized to convey, and could not, under the requirement of the statute, execute the power.

It cannot be necessary to give further reasons, for the purpose of showing that the 112th section has no applicability to this case. There has been no design to obliterate the well defined line which separates the province of the grantee of a power, from that of him who may only consent to its execution. The law remains as it has been long settled at the common law.

It follows, that by the death of Hannah Cary, it became impossible to execute the power. The deed in trust to George A. Cary was therefore inoperative, and conveyed no title, and it would not have aided it if the consent of the latter had been expressed in the conveyance or certified in it in the form prescribed by statute. Of course, no such expression or certificate of consent can be made available now. The plaintiff has no means of perfecting his title by supplying the defect. His only remedy may be upon the defendant's covenant of warranty in the deed, when-

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*Morgan against The Bank of the State of New-York.*

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ever that covenant shall have been broken. The judgment of the supreme court should be affirmed, with costs.

All the judges, except RUGGLES, J., who did not hear the argument, concurred.

Judgment affirmed.

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*MORGAN against THE BANK OF THE STATE OF NEW-YORK.*

In a suit against a bank for money deposited with it by the plaintiff, the defendant produced a check upon the bank, which it had paid, for the amount of the money, signed by the plaintiff and payable to the order of Corlies & Co., and with the name of this firm written upon it; it was proved that this was not the indorsement of the firm, and that it never owned or had any interest in the check; *Held*, that the plaintiff was entitled to recover.

ACTION in the superior court of the city of New-York to recover the sum of \$716.92, deposited by the plaintiff in the defendant's bank prior to April 29, 1852. The answer alleged that the defendant paid the moneys in the complaint mentioned to the order of the plaintiff. Upon the trial before Mr. Justice Duer, it was admitted by the defendant, that the plaintiff deposited in its bank the sum above mentioned at the time stated, and that the plaintiff before suit requested payment of the same, which was refused. The defendant produced two checks which were admitted to be signed by the plaintiff, the one dated April 29, 1852, whereby the defendant was requested to pay to the order of G. W. Corlies & Co. \$271.04, and the other dated May 8d, 1852, by which the defendant was requested to pay to the order of G. W. Corlies & Co. \$445.88. The checks purported to be indorsed respectively by G. W. Corlies & Co., but the genuineness of this indorsement was disputed by the plaintiff. The defendant rested, and the plaintiff called George W. Corlies, who testified that he was a member of the firm of G. W. Corlies & Co. which, since prior to April, 1852, had been and was com-

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*Morgan against The Bank of the State of New-York.*

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posed of himself and Royal H. Waller, and that the name of G. W. Corlies & Co., indorsed on each of said checks, was not the indorsement of his firm, or in the handwriting of either of its members, or of any clerk or agent thereof. On cross examination he testified, that his firm never had any dealings with the plaintiff; that the latter never owed any thing to the firm, and that the checks were never the property of or delivered to it. Upon these facts, the court directed the jury to find a verdict in favor of the plaintiff for the amount claimed; the counsel for the defendant excepted to the decision and direction. The judgment entered upon the verdict was affirmed by the superior court at general term. (*See 1 Duer, 434.*) The defendant appealed to this court, where the case was submitted on printed points.

*A. W. Classon*, for the appellant.

*Wm. M. Evarts*, for the respondent.

JOHNSON, J. The bank had received from the plaintiff deposits of cash amounting to \$716.92, and were consequently indebted to him in that amount. To an action for this sum they claimed, by way of defense, to have paid the amount by the plaintiff's order. This defense they failed to prove upon the trial. They proved an order by the plaintiff to pay the money to G. W. Corlies & Co., or their order, and the payment of the money thereupon to somebody, but did not prove that the money was paid to G. W. Corlies & Co., or their order. On the contrary, the plaintiff proved that the indorsements of the checks with the name of G. W. Corlies & Co. were forgeries. Upon these facts the plaintiff was entitled to recover. The money had not been paid to and according to the plaintiff's order. (*Coggill v. Am. Exc. Bank, 1 Comst. 113. Weisser v. Denison, Court of Appeals, Mar. T., 1854.*) The judgment should be affirmed.

Judgment affirmed.

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*Purdy against Philips.*

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PURDY and others, executors, *against* PHILIPS and others,  
executors.

A sum of money, payable by an instrument in which interest is not mentioned, and which does not specify any time of payment, or that the money is payable on demand, draws interest from the date of the instrument.

ACTION on a bond, dated the 9th of July, 1832, executed by Thomas H. White to Elizabeth Bulmer. They were both dead, and the plaintiffs were the executors of the obligee, and the defendants of the obligor in the bond. The condition of the bond was, "that if said Thomas should and did pay or cause to be paid to said Elizabeth the just and full sum of seven hundred dollars lawful money, then the obligation to be void, else to be in force."

On the trial in the supreme court, before Justice Paine, the bond was read in evidence, and it was admitted that the obligor, during his lifetime and up to February 1st, 1845, paid the obligee sixty dollars a year, from the date of the bond, in quarterly payments; and that after that and up to May 1st, 1850, she was paid by his executors \$42 per year in quarterly payments, and some \$30 besides. The counsel for the defendants insisted that the bond did not draw interest, and that these payments were on account of the principal. The court ruled and decided that the bond carried interest from its date, and that the payments were to be applied first to the payment of the interest, and the residue in extinguishment of the principal, and directed a verdict for the plaintiffs accordingly. The defendants excepted. Judgment was rendered on the verdict, which on appeal was affirmed at general term. The defendants appealed to this court.

*C. W. Sandford*, for appellants.

*N. B. Hoxie*, for respondents.

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Purdy against Philips.

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DENIO, J. The question in this case is whether, upon a bond conditioned for the payment of a sum of money, where no time is mentioned for the payment, and it is not even stated to be payable on demand and nothing is said about interest, interest is payable from the date of the bond. The precise question was decided in England, in favor of the allowance, in *Farghar v. Morris*, (7 Term, 120.) None of the cases referred to on the argument from the courts in this state present the exact point. They show indeed that where no time of payment is mentioned, the money is payable immediately, and an action may be maintained at once; and that interest is generally payable from the time the principal ought to be paid. (*Wenman v. The Mohawk Ins. Co.*, 13 Wend. 267; *Rens. Glass Fac. v. Reid*, 5 Cowen, 587.) In the last mentioned case, *Senator J. C. Spencer*, in illustrating the principle that interest was payable only after a default, stated as a familiar case, that upon a note payable on demand interest was never allowed but from the time of demand made, by suit or otherwise; and *Jacobs v. Adams*, (1 Dall. 52,) is referred to at the foot of the page, where the same thing was said by *McKean, Ch. J.* It was not, however, called for by that case. We think the case in Term consists best with principle, and that we ought to follow it.

The fact of the periodical payments of \$60 *per annum* during the lifetime of the defendant's testator, and of \$42 *per annum* after that time, can have no just influence upon the question. The former sum was more and the latter was less than the legal interest. They were probably made in such amounts on account of the wants of the creditor, and were not thus measured with any view to the interest. The court below was right in directing interest to be reckoned according to the rule where partial payments are made upon a demand drawing interest, and its judgment should be affirmed.

Judgment affirmed.

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*Judson against Gray.*

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*JUDSON against GRAY.*

A rule established by a course of adjudications, which is in conflict with legal principles, should not be extended by analogy.

Referees do not belong to the class of officers to whom attorneys and solicitors have been held personally responsible for services rendered in the suit; and therefore *held*, that the solicitor for the complainant in a chancery suit was not personally liable to a referee, appointed by the court under the judiciary act of 1847, to take and state an account in the cause, for his fees.

PRIOR to October, 1847, one Absalom Calkins commenced a suit in the court of chancery against Asa M. Calkins and others, to enforce an alleged right of redemption; Gray, the present defendant, being solicitor for the complainant. The suit was brought to a hearing in the supreme court, upon pleadings and proofs, in October, 1847, and in March, 1848, the court made a decretal order, declaring that Calkins was entitled to redeem, subject to an account to be taken between the parties; and thereupon the plaintiff, Judson, was, by the consent of the counsel on both sides, appointed referee to take and state the account. The defendant, Gray, as the solicitor of Calkins, notified the plaintiff of his appointment, and requested him to attend, at a time and place named by the defendant, to take the account. The plaintiff attended, pursuant to this request. He was occupied several days in taking the testimony, about an equal amount being taken for each party, and finally reported the sum of \$775.84 as due from the complainant.

After taking the account, the plaintiff, Judson, omitted to file his report; but for what reason does not appear. The defendant made a motion in the supreme court, and obtained an order requiring the referee to file his report, which was done. During the pendency, and before the hearing of the chancery suit, the complainant Calkins filed a bond in the penalty of \$500, as security to the defendants in the chancery suit, for costs; but it did not appear whether this bond was given on



*Judson against Gray.*

account of the non-residence of the plaintiff or not. It appeared upon the trial of this suit, that Gray, the defendant, had no money in his hands belonging to his client, Calkins.

In 1849, the plaintiff, Judson, procured what purports to be a taxation of the items of his fees, including the whole in one bill, and charging therein for horse hire, stage fare, tavern expenses, &c., all of which was taxed and allowed, and amounted to \$155.94. The present action was brought to recover the amount of this bill. It was tried before one of the justices of the supreme court, without a jury, at the Chenango circuit, and upon the foregoing facts judgment was obtained for the plaintiff, which upon appeal was affirmed at a general term in the sixth district. The defendant appealed to this court.

*N. Hill, Jr.*, for the appellant. *First.* The order of appointment was made under the judiciary act, and the plaintiff accepted it on the 10th of July, 1848. He was, therefore, in no sense a master in chancery, but a mere referee. (*Const. of 1846, art. 14, § 8; Laws of 1847, p. 344, § 77; Laws of 1848, p. 567, §§ 4-6.*) *Second.* The cases in this state which have held attorneys liable for the fees of sheriffs and other officers, are entirely anomalous, and should not be followed except in cases precisely similar. (*See 5 John. 252; 5 Paige, 510.*) 1. They violate the rule, that one acting in the character of a known agent is not liable, but only his principal. (*See 5 John. 254, per Thompson, J.; Robbins v. Bridge, 3 M. & Wels. 114, 118, 119; Anonymous, 1 Mod. 209; Wires v. Briggs, 5 Verm. R. 101, 2; Hartop v. Juckes, 1 Maule & Selw. 709; Maybery v. Mansfield, 58 Eng. Com. Law R. 753; 4 Cowen, 260, 263, Woodworth, J.*) 2. They assume that the law raises two distinct implied promises, one by the known principal, and another by his agent. (*See Ousterhout v. Day, 9 John. 114; Cowen's Treat. 120, 1, 2d ed.*) 3. They are contrary to every adjudged case, it is believed, in this country and England. (*Robbins v. Bridge, 3 Mees. & Welsb. 114, 118, 119; Maybery v. Mansfield, 58 Eng. Com. Law R. 753; Hartop v. Juckes, 1 Maule*

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Judson against Gray.

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& Selw. 709; *Hart v. White*, 1 *Holl's N. P. R.* 376; *Wires v. Briggs*, 5 *Verm. R.* 101, 2; *Maddox v. Cranch*, 4 *Har. & M'Hen.* 343; *Moore v. Porter*, 13 *Ser. & Rawle*, 100; *Sargent v. Pettibone*, 1 *Aiken's Rep.* 355; *Preston v. Preston*, 1 *Dougl. R.* 292.) 4. If followed, they will result in holding the attorney liable for the fees not only, but the acts of all he is obliged to employ. (See *Stone v. Cartwright*, 6 *Durnf. & East*, 411; and see the cases last above cited.) *Third.* The present case is essentially different from those where our courts have held the attorney liable, and none of the assumed reasons for such liability exist here. (See 5 *John.* 252, 254, 5, *Thompson, J.*) 1. The plaintiff was not bound, like an officer, to undertake the duty, but, like the attorney, could have refused until the party paid or secured his fees. (See *Lamoreux v. Morris*, 4 *How. Pr. R.* 245; *Howell v. Kinney*, 1 *id.* 105.) 2. Nor is there evidence of any usage or practice for referees to charge their fees to one or both the attorneys, but the evidence is directly the other way. (2 *R. S.* 643, § 36; *Howell v. Kinney*, 1 *How. Pr. R.* 105; *Lamoreux v. Morris*, 4 *id.* 245.) 3. If the plaintiff omitted to assert his claim in opposition to the motion requiring him to report, that is no reason for making the attorney liable. (See 2 *R. S.* 643, § 36; 6 *Eng. Law and Eq. R.* 68.) 4. Nor should the attorney be made liable, even if the plaintiff asserted his claim and the court improperly overruled it. *Fourth.* No court has ever gone so far as to hold an attorney liable to those who act voluntarily, and who have more efficient means of securing their fees than he has. (*Hartop v. Juckes*, 1 *Maule & Selw.* 709; 1 *Aik. R.* 358, *Hutchinson, J.*; 6 *Dowl. Pr. R.* 145, *Abinger, C. J.*) *Fifth.* The courts have generally been averse to extending the liability of attorneys; but the court below, while professing to approve this principle, has extended the liability beyond all precedent. (See 6 *Dowl. Pr. R.* 145, 6, *Abinger, C. J.*)

*J. H. Reynolds*, for the respondent. I. Sheriffs, clerks, masters and other officers of the court have the right to charge their

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Judson against Gray.

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fees to the attorney or solicitor of the party for whose benefit the services are performed, and recover the same from him. (*Adams v. Hopkins*, 5 *John*. 253; *Trustees of Watertown v. Cowen*, 5 *Paige*, 510; *Ousterhout v. Day*, 9 *John*. 114.) The same rule applies in this case. The plaintiff was a referee only to take and state the account; he was not a referee under the code to decide the cause; he performed the duties formerly done by a master.

II. The complainant's solicitor (the defendant in this suit) had the carriage of the decree only, and it could only be executed upon his motion; (*Quackenbush v. Leonard*, 10 *Paige*, 131;) and he did in fact take charge of the execution of the decree, notified the referee to attend for the stating of the account; and after the report was made, by motion compelled the referee to file his report upon which he brought an appeal, and used the report for his own benefit, or for the benefit of his client.

The nature of the bond given by the complainant shows that the complainant was a non-resident of the state; and this court will never force the plaintiff in this action to look to an irresponsible non-resident party, to whom no credit was given. (*Trustees of Watertown v. Cowen*, 5 *Paige*, 510, before cited.)

- SELDEN, J., delivered the opinion of the court. It is a well settled rule of the common law, that where one person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone and not the agent is responsible. This rule is directly applicable to the case of attorney and client, and has been so applied whenever the question has arisen, except in the state of New-York. It was thus applied in England in the cases of *Hartop v. Jukes*, (1 *Maule & Sel.* 709; *Robbins v. Bridge*, (3 *Mees. & Wels.* 114;) and *Maybery v. Mansfield*, (9 *Ad. & El. N. S.* 58, *Eng. Com. Law*, 753;) in Vermont, in the cases of *Sargent v. Pettibone*, (1 *Aikens*, 155;) and *Wires v. Briggs*, (5 *Verm.* 101;) in Maryland, in the case of *Maddox v. Cranch*, (4 *Har. & McHen.* 343;) in Pennsylvania, in *Morse v. Porter*, (13

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*Judson against Gray.*

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*Serg. & Rawle*, 100;) and in Michigan, in *Preston v. Preston*, (1 *Doug.* 292.) The decisions in all these cases were based upon the general rule to which I have referred. In the case of *Robbins v. Bridge*, Lord Abinger says, "The attorney is known merely as the agent, the attorney of the principal, and is directed by the principal himself. The agent acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words." So in *Wires v. Briggs*, the court say, "No rule of law, it has been said, is better ascertained, or stands upon a stronger foundation than this, that where an agent names his principal the principal is responsible, and not the agent;" and in *Preston v. Preston*, the language of Felch, J., is, "In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. The rule of law is well settled, that an agent does not become personally liable, unless his principal is unknown, or there is no responsible principal, or the agent exceeds his power, or becomes liable by an undertaking in his own name."

It is clear, therefore, that the decisions in this state, in which attorneys and solicitors have been held liable for the fees of the officers of the court, upon a promise implied from their acts done as attorneys merely, are in conflict with principle, and with the whole current of authorities elsewhere on the subject. In all such cases, it is a sound and salutary rule, that while the court, for the mere sake of restoring the harmony and symmetry of the law, will not interfere to overthrow a doctrine which has through a series of decisions come to be universally regarded as fixed and settled, they will nevertheless circumscribe the anomaly within as narrow limits as possible. It is never admissible to extend such a rule by a resort to analogy; for the obvious reason, that every new case, to which the erroneous rule is applied, affords the basis of a still wider departure from principle.

But if such a rule is to be extended to analogous cases, it should at least appear, that the reasons which originally led to its adoption apply with all their force to the new cases. The leading case on the subject in the courts of this state is that of

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*Adams v. Hopkins*, (5 John. 252.) In the elaborate opinion of Judge Thompson in that case, the reason for holding the attorney liable is distinctly stated, as follows: "The sheriff had discretionary power left him whether to perform the service or not. *He is bound to execute every legal process delivered to him, before he can demand his fees.* All reasonable security ought therefore to be extended to him, to insure a compensation for his services. He cannot be presumed to be acquainted with the residence or responsibility of parties. *Very different is the situation of the attorney.* He is not bound to undertake any suit, or incur any responsibility, without a reasonable indemnity, if suspicious of his employer." It is true the judge goes further and says: "But admitting an attorney to stand in the situation of a general agent, this would not exonerate him; for in such cases it is not only necessary that the agent should act in his official capacity, but that it should appear that the creditor *intended* to look to the principal for compensation." It is scarcely necessary to say, that this position of the learned judge cannot be supported. It is in conflict not only with the cases which I have cited above, but many others. Indeed the contrary is too well established to be for a moment doubted. The decision must therefore be held to rest exclusively upon the reasons given, growing out of the hardships of the case. And it must be conceded that these reasons are cogent, if it be admissible to depart so widely from an established principle, upon such grounds. It is true that the attorney knows his principal, and has it in his power completely to protect himself, by requiring an indemnity, while the sheriff is compelled to act without any such security. Were it not for this reason, it is clear the rule would never have been adopted; and if strictly confined to such cases, it will perhaps tend to promote justice and lead to no serious evils.

Some other reason, however, must be found for the application of the rule to cases where the officer employed, or set in motion by the attorney, is not *obliged* to act, but has equal means of self protection with the attorney himself. What reason can be given in such cases for violating a well understood general rule,

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for the sake of a party who has neglected to avail himself of the means in his power to secure a compensation for his services? The only one which has been suggested, is that given by the chancellor in the case of the *Trustees of Watertown v. Cowen*, (5 *Paige*, 510,) in which it was held that the solicitor in a suit in chancery was liable to an examiner for his fees. It is, that "it appears to have been the uniform practice in this state for sheriffs, clerks, masters, registers, and other officers of courts of record, to charge their fees to the attorney or solicitor of the party for whose benefit the services are performed." I do not intend to criticise the sufficiency of this reason; but would observe, that of all the officers specially enumerated by the chancellor, masters are the only ones who would not come substantially within the reason given for the rule in *Adams v. Hopkins*. The chancellor does not assert that there had been any such settled practice in regard to examiners; but after stating the practice in regard to other officers, he says: "And there are no good reasons for distinguishing the case of an examiner from that of any other officer of the court in this respect." In thus extending this rule, founded avowedly upon mere usage, to a case to which the usage or practice could not be said to have been applied, the chancellor evidently disregarded the doctrine, that a rule, which is in conflict with general principles, is not to be enlarged by reasoning, drawn from analogy.

But without calling in question the authority or accuracy of this decision, it is sufficient to say that it does not control the present case. Referees do not belong to any of the classes of officers to whom the rule has been held to apply. On the contrary, it was expressly held in the case of *Hornell v. Kinney*, (1 *How. Pr. R.* 105,) that an attorney is not liable for the fees of referees. That, it is true, was an action at law, while the suit in which the plaintiffs acted was in equity; and the argument drawn from the identity of the duties performed now, by a referee in an equity suit, with those formerly performed by a master in chancery, is not without weight. It is, however, met by several considerations. To hold the attorney liable in the

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case of referees in equity suits, simply because their duties are similar to those of masters in chancery, would be to make a new application of a rule admitted to be anomalous, and repugnant to general principles, upon the ground of analogy alone. But a stronger objection arises from the inconvenience and confusion which would result from applying to officers, known by the same name and appointed by the same court, different rules, depending merely upon the side of the court from which they happen to receive their appointment. Referees would have, in every case, to settle the often difficult question, whether the suit should be regarded as in its nature legal or equitable, before they could determine to whom they must look for their fees. I see no ground for distinguishing between referees appointed under the judiciary act, in a suit originally commenced in chancery, and those appointed in an equity suit under the code. The difference in the duties and functions of referees, in different cases under the code, is as great as in chancery and common law cases prior to its adoption. Whatever rule, therefore, is adopted for this case, must equally apply to the case of referees in equity cases under the code.

It is not intended, by this decision, to interfere with the doctrine advanced in the case of *Adams v. Hopkins*. There is an apparent equity in holding the attorney liable in a case of that description, which goes very far to justify the departure from principle involved in the decision; and if the rule be confined to those cases to which the reason given by Judge Thompson applies, we have at least a clear line of distinction between the cases where the liability of the attorney attaches and where it does not.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

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*Caldwell against Murphy.*

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*CALDWELL against MURPHY, survivor, &c.*

Where the charge of the court involves several propositions, and as to some of them it is unobjectionable, an exception taken at its conclusion to each and every part of the charge, presents no question for review on a bill of exceptions.

Upon the question, whether the plaintiff, in an action for an injury to his person, was seriously injured, his complaints of pain and distress at the time of the alleged injury, are competent evidence in his own behalf, in connection with other testimony, of his condition.

APPEAL from the judgment of the superior court of the city of New-York. The action in the court below was for negligence in the driving of a stage or omnibus alleged to belong to the defendants, and to be driven by their servant, on one of the avenues of the city, by means of which the plaintiff, who was a passenger, was injured, the stage having been overturned. The complaint contained also a claim for damages on account of the death of a child of the plaintiff, who accompanied him, and was, as alleged, killed by the same upsetting of the stage. In the progress of the trial, the judge ruled that no recovery could be had on account of the death of the child, and consequently no question upon that part of the case arose upon the appeal. There was a verdict for the plaintiff, for the injuries to himself, of \$625, for which he had judgment, which was affirmed at a general term. (*See 1 Duer, 233.*) Several exceptions were taken by the defendant's counsel in the progress of the trial before Mr. Justice Duer, which, with the facts upon which they depended, are sufficiently stated in the opinion of the court. A bill of exceptions was duly signed in the court below. Kavanagh, one of the original defendants, died after issue joined and before the trial, and the action proceeded against the surviving defendant, who appealed to this court from the judgment in the court below.

*T. Darlington*, for the appellant.

*E. D. Wheeler*, for the respondent.



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Caldwell *against* Murphy.

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DENIO, J. None of the points arising out of supposed errors committed by the judge in his charge can be sustained, for the reason that no sufficient exceptions were taken. The charge is set out at length, covering the whole case and occupying several printed pages, and many portions of it being favorable to the defendant, are not objected to. The exception is at the end, and is "to each and every part" of the charge. This has so often been held insufficient, that no further remark respecting it is now necessary. (*Jones v. Osgood*, 2 *Selden*, 233.)

It is assumed by the defendant's counsel, that the judge at the trial permitted evidence to be given, against the defendant's objection, of the plaintiff's poverty, as a circumstance affecting the amount of damages. An attentive examination of the bill of exceptions has convinced me that the evidence was not admitted for that purpose, and that it was entirely competent in the view in which it was offered. The plaintiff was proved to have been considerably injured by the upsetting of the stage, but whether he was permanently disabled or not, was a matter earnestly litigated. To show that he continued to suffer from the effects of the injury down to the time of the trial, the plaintiff proved that he was a ship carpenter, and that he had not been able to work constantly more than a few weeks after the injury occurred. On the cross-examination, the plaintiff raised the question, whether his being without work was not occasioned by his not attempting to procure employment. The witness was made to answer, that he was never present when the plaintiff applied for work, and that what he knew about his inability to labor was founded principally on what the plaintiff had told him. After several other questions by the counsel and the court, the object of which was to ascertain whether he was voluntarily idle, whether his being without work was on account of his not being able to get employment at his trade, or whether it was, as the plaintiff contended, on account of his inability to labor, by reason of his injuries, the plaintiff's counsel put this question: "Had he the means of support for himself and family, except his labor?" It was objected to. The objection was

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*Caldwell against Murphy.*

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overruled and the defendant excepted. The witness answered, "He had no means of support except what he got from the charity of his friends." The defendant's view of the matter was still pressed by a further cross-examination of the same witness, and then the judge put some questions to ascertain the number of persons in the plaintiff's family, and in what manner they were supported after the injury; it having been shown that before that he had constant employment. The evidence was objected to, and an exception was taken to its admission. I think the evidence was admissible, to show that the plaintiff's circumstances were such that he would probably have been engaged in laboring in his calling if he had not been disabled by his injuries, and that he was in a considerable degree unable to labor. Had he been a person of pecuniary means, his being out of employment would have been slight if any evidence of disability; but having a family dependent upon him, and being without means of support except his labor and the charity of his friends, his omission to employ himself, in connection with the other evidence of his injuries, had a bearing upon the extent to which he had been disabled by the occurrence in question. The course of the examination makes it apparent that the object of the questions objected to is such as I have stated, and that the evidence was not offered, as the argument suggests it to have been, to influence the amount of the recovery, under the notion that a poor man would be entitled to a measure of damages different from that which would belong to one in other circumstances.

The plaintiff was permitted, against the objection of the defendant, to give in evidence the declarations of James Kavanagh, who was originally a defendant, but who had died after issue joined and before the trial, as to the ownership of the stage. This was wholly immaterial. The defendants had not, in their answer, put in issue the question of the ownership of the stage, and it was therefore admitted. It was distinctly alleged in the complaint that the defendants owned the stage in which the plaintiff was a passenger, and this is nowhere denied in the answer. The answer does indeed state that the defendants did not employ

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or use any stage which was of the unsafe or bad character mentioned in the complaint; and they deny that they had any stage which was upset in consequence of such bad condition or the careless or negligent use thereof. This only controverts the alleged acts of negligence. In other parts of the answer, they admit by inevitable implication that the stage to which the complaint refers belonged to them; for they say that the plaintiff threw the child mentioned in the complaint from the top of one of their (the defendants') stages; and in another place they allege that their stage was upset by reason of the bad condition of the road.

In answer to a question to a witness by the plaintiff's counsel, as to the condition of the plaintiff's health since the accident, the witness answered, "he has invariably complained." The defendant requested to have this answer stricken out; but the court refused to strike it out, and the defendant excepted. It appeared by the other testimony of this witness, that he had attended upon and taken care of the plaintiff from the time of the accident for about ten or eleven days, and had assisted him in rising from his bed and getting down stairs, and had seen him repeatedly since. It was also proved by a physician that he was injured internally, as was shown by bloody discharges from his bowels. I am of opinion that the evidence objected to did not fall within the rule which excludes the declarations of a party in his own favor. It is one of the natural concomitants of illness and of physical injuries, for the sick or injured person to complain of pain and distress. A complaint, it is true, may be simulated, but it is generally real. I think such evidence is admissible from the necessity of the case, and that it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition. In a somewhat similar case, Lord Ellenborough said, "If inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time, *this* must be evidence. What were the *complaints*, what the symptoms, what the conduct of the parties themselves at the time, are

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Dunkel against Wiles.

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always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing." (*Aveson v. Kinnaird*, 6 East, 188. See also the cases cited in *Cowen & Hill's Notes*, p. 587, note 447; 1 *Greenl. Ev.* § 102, and the cases referred to in the notes.)

The charge of the judge responded accurately to the several requests for instructions, so far as the evidence raised the questions suggested by the defendant's counsel; and upon the whole I am of opinion that no error was committed upon the trial. The judgment should be affirmed.

PARKER, J., also delivered an opinion in favor of affirmance.

All the judges, except RUGGLES, J., who did not hear the argument, concurred.

Judgment affirmed.

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DUNKEL against WILES.

A judgment record in an action of trespass, in which the declaration alleged that the defendant wrongfully entered and felled timber in a close of the plaintiff, describing it by metes and bounds and as containing about one hundred acres, and the plea was that the part of the close in which the supposed trespasses were committed was the soil and freehold of the defendant, upon which issue was taken and there was a verdict and judgment in favor of the plaintiff, is not evidence that the title to the entire close was in question and adjudged to be in the plaintiff.

It is evidence that title to the part only of the premises which came in question was found and adjudicated in favor of the plaintiff. What part this was must be proved *aliunde*.

In a subsequent suit between the same parties or their privies, as to the title to a particular part of the land embraced within the description of the close, the party setting up the former recovery as an estoppel must prove affirmatively that the title as to this particular part was in controversy and passed upon in that suit.

Exceptions are sufficiently specific where it appears that each offer or request was separately made and passed upon, and each ruling excepted to.

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*Dunckel against Wiles.*

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EJECTMENT, commenced in 1843, to recover possession of about seven acres of land situate in Canajoharie, Montgomery county. The action was tried in 1845, before Willard, circuit judge, when the defendant recovered a verdict. This verdict was set aside and a new trial ordered. (*See 5 Denio*, 296.) The action was again tried, when the plaintiff recovered. This verdict was also set aside. (*See 6 Barb.* 515.) On the third trial, in 1849, before Paige, J., the plaintiff proved title to a farm situate in a patent known as the Livingston patent, and bounded on the east by the easterly line of said patent, and gave evidence tending to prove that the seven acres in dispute, and which were possessed by the defendant, were a part of and situate in the northeast corner of said farm, and that the east line of the seven acres was the east line of said Livingston patent, and the west line of a patent known as the Morris patent, which adjoins the Livingston patent on the east; and rested.

The defendant insisted and gave evidence which he claimed tended to prove that the true line between the Livingston and Morris patents was west of the line claimed by the plaintiff, and that the seven acres in dispute were or a part thereof was situate in the Morris patent. He also proved that in 1833, one Jackson was the owner of a parcel of land situate in the Morris patent and bounded by its west line and adjoining the land of the plaintiff. He also gave in evidence the record of a judgment in the supreme court, in an action commenced in 1833, in which said Jackson was plaintiff, and Dunckel, the plaintiff in this suit, was defendant. By this record it appeared that the action was in trespass, the declaration alleging that Dunckel broke and entered "a certain close of Jackson situate in Canajoharie, Montgomery county, and known as part of lots Nos. 4 and 5 in third mile or tier of lots in a division of large lot No. 6 in a patent granted unto Lewis Morris and others, bounded as follows: beginning at a hemlock tree on the southwest corner of lot number one in the second mile or tier of said large lot No. six, and runs thence south seven degrees east nineteen chains 68 links; thence south thirty-three degrees west sixteen chains and 13 links; thence south

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Dunckel *against* Wiles.

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sixty-seven degreee east eleven chains and 26 links ; then south thirty-three degrees west 35 chains ; then north sixty-seven degrees west about thirty chains, *to the west bounds of said patent* ; then north twenty-seven degrees fifteen minutes east 35 chains to the place of beginning ; containing one hundred and twenty-eight acres, excepting thereout on the north end twenty-three acres ;" that Dunckel pleaded specially to this declaration that the part of said close mentioned therein and in which the trespasses are therein supposed to have been committed is and at the times when, &c., was the close, soil and freehold of him, said Dunckel, in said town of Canajoharie ; wherefore, &c. Jackson replied, taking issue on this plea. By the record it further appeared that this trespass suit was tried in 1834, and the jury rendered a verdict in favor of Jackson, in the following words, viz : " that the said close in the said declaration mentioned, *in which, &c.*, was not, nor was any part thereof the close, soil and freehold of him said Dunckel in manner and form as he said Dunckel hath above in his said plea alleged, and that they find a verdict in favor of said Jackson for six cents damages and six cents costs ;" and that judgment was rendered for the six cents damages and costs of suit. The defendant read in evidence a deed from Jackson to one Roof, dated in 1835, in which the land is described in the same terms as those by which the close in the declaration in the trespass suit is described, and by which Jackson conveyed to Roof about eighty-four acres thereof, being the portion bounded westerly by the west line of the Morris patent. The defendant derived title from Roof. The defendant gave evidence tending to show that the hemlock tree mentioned in the description of the close in the trespass suit and in the deed to Roof was on the line claimed by the defendant to be the true line between the patents, and proved that the description in the declaration in the trespass suit embraced the seven acres sought to be recovered by the plaintiff in this suit. Thereupon the justice holding the circuit ruled and decided that the said record of judgment was *prima facie* evidence against the plaintiff, Dunckel, of title in Jackson, under whom defendant claimed, to

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*Dunkel against Wiles.*

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the whole of the land described in the declaration in the trespass suit, and that the burthen of proving that the trespass in question in that suit was not upon the seven acres sought to be recovered in this action, or that title to the same was not in controversy or passed upon by the jury in that suit, rested upon the plaintiff. To this ruling and decision the counsel for the plaintiff excepted.

The plaintiff then proved that no evidence was given upon the trial of the trespass suit; that in opening that case the plaintiff's counsel inquired of the defendant's counsel if the defendant claimed to own any land in the Morris patent; that he replied that he did not, but that he claimed a part of the premises described in the declaration as being in Livingston's patent. That, thereupon, the judge upon that trial ruled, that the defendant could not give evidence of title to any of the land described in the declaration, as he disclaimed owning any land in the Morris patent; that no proof was given on either side upon that trial, and that the judge directed a verdict for the plaintiff for six cents damages, which was accordingly rendered.

The plaintiff, on the trial in this suit, further offered to show, that the east line of the two lines in controversy was the true line of the patents; that the deeds under which the plaintiff claims bound him on this east line; that he and those under whom he claimed have occupied the premises up to this east line for over fifty years, and that the occupants of the adjoining lands in Morris' patent have held to and acknowledged the east line to be the true line. He also claimed that the facts as to which was the true line, with the facts on which the defendant claimed that the plaintiff was estopped, should be submitted to the jury, and also that the question of the location of the seven acres, and whether that location is within the terms of Jackson's deed and his declaration, were questions of fact for the jury; and he asked that all these questions should be submitted to the jury. The justice, in respect to these offers, stated that he would allow the plaintiff to show that the hemlock tree called for in the declaration in Jackson's suit and in the deed from Jackson to Roof, as

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the northwest corner of the Jackson lot, was not on the west line. With this qualification the judge severally denied and overruled each of said offers and requests, and the plaintiff severally excepted to each of the decisions denying and overruling such offers and requests.

The justice then decided "that as the evidence (which is undisputed on the point) shows that the seven acres, the premises in question, were embraced within the deeds under which the defendant claims title and in the declaration in the suit of Jackson against Dunckel, the plaintiff, the title to said premises was within the issue in that suit, and that the title to these premises came directly in question in the trespass suit, and was passed upon by the court and jury in that suit, and that under the testimony the record of the recovery in that suit was conclusive evidence of the defendant's title to the premises in question, and he thereupon nonsuited the plaintiff." To which the plaintiff excepted. The plaintiff moved the court, at a general term, on a bill of exceptions, for a new trial, which was refused, and judgment rendered in favor of the defendant. The plaintiff appealed to this court.

*N. Hill, Jr.*, for the appellant.

*J. H. Reynolds*, for the respondent.

JOHNSON, J. When this case was before the supreme court, (5 *Denio*, 296,) it appeared that the judge before whom the trial had been had, upon proof by the defendant of the record in the trespass suit, coupled with proof that the premises described in the declaration in that record included the premises claimed by the plaintiff in this suit, ruled that the judgment was a conclusive bar to the action. The court granted a new trial, being of opinion that it did not appear from the record that the title to the seven acres came necessarily in question in the trespass suit. The new trial resulted in favor of the plaintiff, but in the course of the trial the judge was requested by the defendant to charge the jury, that if they believed from the testimony that the tres-



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passes for which Jackson prosecuted Dunckel were upon the seven acres in dispute in this suit, then that judgment was a bar. This request was refused. The case then came before the present supreme court, and a new trial was again granted; (6 *Barb.* 515;) opinions were given by two of the judges; Hand, J., holding that the record was *prima facie* evidence that the title to these premises was in controversy in the trespass suit, after proof *aliunde* that the premises described in the declaration in that suit included these premises, and also affirming that upon proof that this parcel was the land for trespass upon which that suit was brought and recovery had, the record would be conclusive. Willard, J., rests his opinion upon the latter of these grounds. A new trial was accordingly had, and the bill of exceptions there taken is now before us.

Upon the pleadings in the trespass suit, the substance of the issue was upon the title to the place where the trespasses were committed. The plaintiff was at liberty to prove a trespass any where within the bounds of the close described in the declaration, and the defendant, if unable to make out a title in that place, would fail, although he proved title to every other part of the premises described. This position was examined upon the authorities in the case in 5 *Denio*, 296, and is not denied in 6 *Barbour*, before cited, and is beyond question. (*Rich v. Rich*, 16 *Wend.* 663; *King v. Dunn*, 21 *Id.* 253; *Bassett v. Mitchell*, 2 *B. & Ad.* 99; *Smith v. Royston*, 8 *M. & W.* 381.)

The actual verdict is in accordance with this view. It is not general, that no part of the close described in the declaration is the close, soil and freehold of the defendant, but is limited to the place where the trespass was committed, by its express terms. Upon this record, looking at it with these views of the rights of the parties upon the trial, I do not see how it is possible to say that the title to any particular part of the premises described in the declaration came in question. All we can see upon its face is, that whatever part of the premises was brought into question, upon the trial, was found to be not the property of Dunckel. Looking at the record alone, it is not even possible to say that

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the premises described in it include any part of the lands for which this ejectment is brought. Upon its face it is possible, in legal contemplation, to see that the title to the premises claimed in this suit may have come in question. And when it was shown *aliunde* upon the trial that the premises described in the declaration in the trespass suit did, upon the ground, include those for which this suit was brought, all that was thus established was what was apparently true upon the face of the record, that the title to these seven acres may have come in question. It is not upon a possibility or probability, however strong, that an estoppel can rest. The matter of the estoppel must actually have come in question and been determined. The burthen of showing that it did come in question, must fall upon the party who seeks the benefit of the estoppel; for it is a part and a necessary part of his case.

This doctrine does not trench upon that which was said by the court in *Seddon v. Tutop*, (6 T. R. 607,) *Bagot v. Williams*, (3 B. & C. 235,) and *Phillips v. Berick*, (16 John. 136.) In each of those cases the defense was a former recovery for the same cause of action, and in each it was said, in substance, that if the cause of action in the former suit was apparently the same as in the second, the burthen was upon the plaintiff to show the contrary. Where a plaintiff seeks to recover that which he has apparently already recovered, or had an opportunity to recover, the burthen may well be upon him to show, as Lord Kenyon said in *Seddon v. Tutop*, beyond all controversy, that the second is a different cause of action from the first. In the case before us the record does not show an apparent identity of the close in which the trespass was committed and the premises sought to be recovered in this suit, for the record does not inform us where in the 105 acres included in it, the trespass was committed. See the remarks of Beardsley, J., in *Dunkel v. Wiles*, (5 Denio, *supra*;) of Lord Tenterden, in *Bassett v. Mitchell*; of Alderson B. in *Smith v. Royston*; of Bronson, J., in *Young v. Rummel*, (2 Hill, 481;) and *Outram v. Morewood*, (3 East, 354, 5.)

But if the court at the trial was right in holding that the

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record was *prima facie* evidence against the plaintiff in this case that the title to these premises came in question on the trial of the trespass suit, the evidence subsequently given overthrew the presumption. It appeared that upon that trial no evidence was given on either side, and a verdict was directed for the plaintiff by the judge. That verdict was precisely such as the jury was bound to pronounce, in the absence of evidence. A technical trespass, somewhere within the close described in the declaration, was admitted by the plea; the burthen of making out title to the place in which, &c., was on the defendant. In the absence of evidence, the verdict therefore was against the defendant upon his plea, and the plaintiff had his nominal damages assessed for the technical trespass, which was admitted upon the record. All this was strictly correct. (*Rich v. Rich, supra.*) All this is just as conclusive against the defendant in the trespass suit in respect to the recovery in that suit, as if the recovery had been had upon a hard litigation at the trial. But when the record comes to be used as an estoppel upon the question of title in this suit, and it is shown that the trespass was not located any where, all that it decides is, that the part of the 105 acres described in the declaration, upon which the technical trespasses are confessed to be done, was not the defendant's property. Neither party can affirm that the verdict related to any particular part of the property described, and it cannot therefore be available as an estoppel in respect to these seven acres of land. Unless this be so, the verdict is conclusive upon the title to the whole 105 acres. (*Lawrence v. Hunt, 10 Wend. 80; and Jackson v. Wood, 8 Wend. 9.*)

At the close of the evidence the plaintiff asked, that the question of the location of the seven acres, and whether that location was within the terms of Jackson's deed to Roof and his declaration, should be submitted to the jury. In respect to this request, the first question is whether the exception is sufficiently definite to raise the point. On the part of the defendant, it is contended to come within the rule stated in *Jones v. Osgood*, (2 Seld. 233.) We do not so regard it. The bill of ex-

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ceptions shows by express statement that each of the offers and requests was severally denied and overruled, and that the plaintiff severally excepted to each of those decisions. It is no objection to the statement that it is all contained in one sentence, so long as it shows distinctly, as this statement does, that each offer or request was separately made and ruled upon, and each ruling excepted to. Looking at the description of the lands in the declaration in the trespass suit, it will be observed that the west line of the Morris patent forms the starting point from which runs a line to the hemlock tree, the place of beginning; and that this line is the western boundary of the lands described in Jackson's declaration. Whether a line so run includes the whole of the premises sought to be recovered in this suit, or only a small portion on the east side, depends upon the question whether the west boundary of Morris' patent is to be located at the most westerly of the two disputed patent lines. If it is, then the seven acres were within the description in Jackson's declaration. If, on the other hand, the east line was the true line, then, at most, but a small part of the seven acres was included in the declaration in the trespass suit. Upon the question which of these lines was the true one, there was conflicting evidence, which should have been submitted to the jury.

There must be a new trial, costs to abide the event.

W. F. ALLEN, J. The plea of *liberum tenementum* only put in issue the title to that part of the close described in the declaration in the action for trespass *quare clausum fregit*, upon which the alleged wrongful act was committed. Neither party was called upon in that action to show title to the whole close described in the pleadings, but it was enough to show title to the part in which the trespass was committed. The allegation of title was divisible. The plea admitted a trespass somewhere in the close, but not in every part of it, and upon showing title to any part, it would have devolved upon the plaintiff to prove that the trespass, for which he claimed to recover, was committed in some other part of the close to which the defendant

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Dunckel against Wiles.

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had not title, and upon showing this, he would have entitled himself to recover. The law would have shifted the burthen of proof from one to the other party, by allowing the parties to apply their evidence according to the justice and equity of the case. (*Rich v. Rich*, 16 *Wend.* 663; *Smith v. Royston*, 8 *M. & W.* 381; *Tapley v. Wainwright*, 5 *B. & Ad.* 395; *Bassett v. Mitchell*, 2 *id.* 99; *King v. Dunn*, 21 *Wend.* 253.)

The substance of the issue only was to be proved, and that was, whether the spot on which the alleged wrongful act was done, the *locus in quo*, belonged to the one party or the other. Patterson, J., in *Bassett v. Mitchell*, says, "The description given in the declaration is merely for the purpose of identifying the close, which is the subject of the action. When the trespasses are stated, the words 'in the said close' do not mean every part of the close, and the plea must be understood in an equally confined sense."

The defendant in this suit, seeking to show title in himself to the premises in dispute by means of the estoppel created by the recovery and judgment in the former action, was bound to show affirmatively that the title to those premises was passed upon by the court and jury in that action. Had it been apparently necessary to pass upon that question before the judgment could have been given, the record would have been *prima facie* evidence for the defendant, and would have been conclusive as an estoppel against the plaintiff, unless evidence had been given on his part to contradict and overcome this presumption. But the issue upon the title relating only to the particular spot in which the trespass is proved to have been committed, without evidence of that location, the record cannot conclude either party; and the onus is upon him who seeks to avail himself of the judgment, when sufficient does not appear upon the face of the record, to show by proof *aliunde* that the title sought to be litigated in this action, was directly in controversy in the former. The declaration and plea being general and relating to the whole close set out by abutments in the declaration, the only matter in controversy, or which could have been tried and decided, was the title

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to the precise *locus in quo* of the trespass. The affirmative of this issue upon the trial of this action was with the defendant, who alleged title and sought to establish it by the former trial and judgment; and without reference to the general rule that estoppels are not favored in the law, and that a party alleging them can take nothing by intendment, argument or inference, which is well established, he was bound to give some evidence of title, by showing that the title to the premises in dispute had been adjudged to be in him or those under whom he claimed by a judgment binding upon the plaintiff as a party or privy. The circuit judge, after the defendant had put in evidence the record of judgment in the action of trespass, and given evidence tending to show that the premises claimed by the plaintiff in this action were included within the boundaries of the close described in the declaration in that action, ruled and decided that the judgment was *prima facie* evidence of title in Jackson, under whom the defendant derived his title to the whole lot, and that the burthen of proving that trespass on the seven acres in question, or that the title to the same, was not in controversy on the trial of that suit, or passed upon by the jury, lay upon the plaintiff.

The law says that the plaintiff in trespass *quare clausum fregit* can recover, upon showing title to any part of the close described in the declaration, if the act complained of was done upon that part; that the allegation of title is divisible, and the substance of the issue, no matter how comprehensive the claim may be, is as to the title to the precise spot in which the trespass was committed. It follows, then, that the title to the whole close was not actually or presumptively in issue. No legal presumption can exist, that the finding of the jury was beyond or more comprehensive than the issue, and certainly no presumption should be indulged in favor of an estoppel which is designed to conclude a party by excluding evidence of the truth. It was for the defendant to show, by evidence, in what part of the close the trespass was committed, and thus apply the issue and judgment to the premises now in controversy. Cowen, J., in *Rich v. Rich*, speaking of the effect of a judgment in an action of trespass in

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Dunckel *against* Wiles.

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which a plea of *liberum tenementum* had been interposed, quotes Lord Tenterden in *Bassett v. Mitchell*, and says: "It is said that the record, under these circumstances, will not be decisive evidence in a future action; nor will it as to the whole land in question; but either party may show, by evidence, what part it was that was affected by the result of the cause;" and quotes with approbation the remarks of Littledale, J., in the same case, who says, "The record would be evidence of a former decision as to part of the place in dispute, and it must be shown by proof which part that was." If, as I think is clear upon principle and authority, the judgment is only evidence that the title to some part of the premises in dispute in the trespass suit is in the defendant, it was for him to locate that part by proof, and show that it embraced the premises in dispute in this action. The opinion of Beardsley, J., in this case reported, (5 *Denio*, 296,) is entirely satisfactory and conclusive upon this point. The subsequent judgment of the supreme court sitting in the fourth district, (6 *Barb.* 515,) is not in conflict with the opinion of the court before given, as it was placed by Judge Willard, with whom Paige, J., concurred, upon the ground that evidence had been given tending to show that the trespass for which the recovery had been suffered, was upon the premises now in dispute, and which should have been submitted to the jury. Willard, J., says, "I am not aware that any thing has been said hitherto which is in conflict with the decision of the supreme court, when they sent this cause down to a new trial." I think the learned judge at the circuit must have misapprehended the effect of the last decision, by assuming that it was in conflict with the former judgment in the case. The reasoning of Judge Hand does not appear to have been adopted by his associates. The judgment of the supreme court must be reversed and a new trial granted, costs to abide event.

DENIO, J., having been counsel in the case, and RUGGLES, J., not having heard the argument, took no part in the decision; all the other judges concurred in the foregoing opinions.

Judgment accordingly.

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*Kelly against The Mayor &c. of New-York.*

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**KELLY *against* THE MAYOR &c. OF NEW-YORK.**

The corporation of the city of New-York, which had ordered a street to be graded and contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor in performing the work.

The rule is not otherwise, although the contract provides that the work shall be done under the direction and to the satisfaction of certain officers of the corporation.

THE action was brought by Kelly in the New-York common pleas against the mayor, aldermen and commonalty of the city of New-York, to recover for an injury to his horse, alleged to have been caused by the negligence of the defendants or their servants in blasting rocks, in the opening and excavating of Seventy-first street in the city of New-York. The cause was tried before justice Woodruff in January, 1852.

The plaintiff proved that in October, 1850, he was driving along the Bloomingdale road, in the vicinity of Seventy-first street, when his horse was struck and injured by a stone thrown from a blast set off on the last mentioned street; he also gave evidence tending to prove that the person in charge of the blast gave no notice to persons passing on the Bloomingdale road. The counsel for the plaintiff read in evidence the following resolution passed by the common-council of the city of New-York, and duly approved by the mayor in July, 1850, viz: "Resolved, that a country road thirty feet wide be worked through the center of Seventy-first street, from the eighth to the tenth avenue, under the direction of the commissioner of repairs and supplies, and that the expense thereof be charged to the appropriation for roads and avenues." He also read in evidence a contract, dated in August, 1850, between "the mayor, aldermen and commonalty of the city of New-York, by William Adams, their commissioner of repairs and supplies of the first part," and John Quin of the second part, by which Quin agreed to grade



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*Kelly against The Mayor &c. of New-York.*

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a space thirty feet wide through the centre of Seventy-first street from the eighth to the tenth avenue, complying in every respect with the specification and profile on file in the office of the commissioner of repairs and supplies. By this contract Quin was bound and agreed to erect a fence across the end of the work, and during the night to keep burning proper and sufficient lights on and near the work, and to take all other necessary precautions for the prevention of accidents or injuries to persons or property, and to indemnify the party of the first part against all loss or damage by reason of any neglect or unskillfulness in the execution of the work. The contract contained the following provision among others: "The whole work to be done under the direction and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work; and the certificate of the superintendent of roads and the surveyor, to that effect, will be a condition precedent to the acceptance of the work, and payment for the same." It was proved that all the blasting done on Seventy-first street in the execution of the contract was done by and under the immediate charge of one Ford, who was employed by Quin, the contractor, and that Ford set off the blast which caused the injury. Evidence was given showing the directions given by Quin to Ford as to care, and giving warning of the blast, and tending to prove the manner in which the blasting was done, and notice given to persons passing. It was admitted that the commissioner of repairs and supplies, in accordance with the ordinances of the city, previous to the making of the contract given in evidence, advertised for proposals for the work; and that proposals were received and the contract awarded to Quin, who was the lowest bidder.

The counsel for the defendants insisted that they were not liable for the negligent acts of the contractor Quin or workmen employed by him in doing the work, and moved the court to so rule and nonsuit the plaintiff. The court declined to so rule or nonsuit the plaintiff, and charged the jury, that if they were satisfied that the injury to the plaintiff's horse was caused by the

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Kelly *against* The Mayor &c. of New-York.

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negligence of Quin, the contractor, or of workmen employed by him on the job in doing the blasting, and that the plaintiff had in no way contributed to the accident by his own carelessness, the defendants were responsible for the damage. The counsel for the defendants excepted. The jury rendered a verdict in favor of the plaintiff for \$125 damages, upon which judgment was rendered against the defendants. They tendered a bill of exceptions, and, the judgment having been affirmed by the common pleas at a general term, appealed to this court.

*R. J. Dillon*, for the appellants, insisted, I. The relation of master and servant, or of principal and agent, did not exist between the corporation and Quin, who by the contract undertook an independent employment. (*Blake v. Ferris*, 1 *Selden*, 48; *City of Buffalo v. Holloway*, 3 *id.* 493.) II. The workmen who caused the injury were the agents of John Quin, not of the defendants. Quin was responsible for his selection, and they were responsible to Quin, and not to the defendants, for any disobedience of orders. The same reservation appeared in the case cited, and was fully argued and discussed, and held not to affect the general principle. (*Pack v. Mayor &c. of N. Y., Court of Appeals*, MSS. *Duffy v. Mayor &c. of N. Y., Superior Court*, MSS.) III. The contract was entered into pursuant to the charter and ordinances, which made it compulsory upon the defendants to commit the execution of the work by contract to Quin, as the lowest bidder. They cannot, therefore, be responsible for the negligence of him or his workmen. (*Amended Charter of 1849*, § 23; *Ordinance of May 30, 1849*.)

*L. B. Shepard*, for the respondent, insisted that this case was distinguishable from that of *Blake v. Ferris*, (1 *Selden*, 48,) and *Pack v. The Mayor &c. of New-York*, recently decided. The contract with Quin provides that "the whole work is to be done *under the direction*" of the commissioner of repairs and supplies and others. This language retains the control of the work to the corporation, and it cannot be said that

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Kelly *against* The Mayor &c. of New-York.

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Quin was exercising an independent employment. (See *Allen v. Hayward*, 7 *Queen's Bench*, 970, 975, 976; *Burgess v. Gray*, 1 *Common Bench*, 587, 593; *The Mayor &c. of New-York v. Baily*, 2 *Denio*, 433; 16 *English Law and Eq. Rep.* 445-447, n. 1, where cases upon the doctrine of *respondet superior* are collected.)

SELDEN, J., delivered the opinion of the court.

The written agreement between the defendants and John Quin, the immediate employer of the persons through whose carelessness the injury to the plaintiff was occasioned, contained the following clause: "The whole work to be done under the direction, and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work: and the certificate of the superintendent of roads and the surveyor, to that effect, will be a condition precedent to the acceptance of the work and payment for the same." It is claimed that this clause distinguishes this case in principle from those of *Blake v. Ferris*, (1 *Selden*, 48,) and *Pack v. The Mayor &c. of New-York*, (4 *Selden's Rep.* 222.)

In the last of these cases the contract contained a clause by which the contractor engaged to conform the work to such further directions as might be given by the corporation or its officers. It was claimed that this clause distinguished the case from that of *Blake v. Ferris*, (*supra*.) But the court held, that the effect of this clause was to give to the corporation power to direct as to the results of the work merely; that is, its condition, when completed; that it gave them no control over the contractor or his workmen, as to the manner of performing it, and had no tendency therefore to create the relation of master and servant, or of principal and agent, between the corporation or its officers, and the contractor or the workmen employed by him. In the case at bar the language is somewhat broader and more comprehensive. "The whole work" is to be done "under the direction and to the entire satisfaction," &c. Still I think the reasoning

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Kelly *against* The Mayor &c. of New-York.

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of the court in the case of *Pack v. The Mayor &c.* applies equally to this. The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master or principal, for the acts of his servant or agent. In the case of *Pack v. The Mayor &c.*, (*supra*), Jewett, J., says: "The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for an injury resulting from the want of skill, or want of care, of the person employed." As a general rule, certainly, no one can be held responsible as principal, who has not the right to choose the agent from whose act the injury flows. There may be exceptions, as in the case of *Bailey v. The Mayor &c. of New-York*, (3 Hill, 531.) The principle of that case, however, has no application to this. But the corporation, in addition to its want of power to protect itself by the employment of suitable workmen, had no power to direct in this case, any more than in that of *Pack v. The Mayor, &c.*, as to the particular manner of performing the work. The object of the clause relied upon, was not to give to the commissioner of repairs, and the other officer named, the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done, nor *who* should do it. This case, therefore, cannot be distinguished in principle from those already decided by this court; and it would be a work of mere supererogation to repeat the reasoning in those cases.

The judgment of the common pleas must be reversed and a new trial ordered, with costs to abide the event.

Judgment accordingly.

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Thatcher *against* Morris.

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THATCHER *against* MORRIS and another.

Where a party seeks to enforce in the courts of this state a contract which by its laws is forbidden and declared void, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid.

Accordingly, where in a suit to recover prize money drawn by tickets owned by the plaintiff in a lottery alleged to be authorized by and established pursuant to the laws of Maryland by the defendants, and drawn at Baltimore, the complaint did not state *where* the tickets were sold or purchased by the plaintiff; *Held*, on demurrer, that the complaint did not state a cause of action enforceable in the courts of this state.

THE complaint alleged that the defendants were contractors and managers in certain lotteries authorized by the laws of the state of Maryland, and that by such laws they were authorized to sell tickets in such lotteries, to be drawn at Baltimore; that they sold tickets in the lotteries to divers persons to the plaintiff unknown, in schemes set out and stated in the complaint: that afterwards there was a drawing of the lotteries in pursuance of the schemes at Baltimore in the state of Maryland, and that certain of the tickets specified drew prizes amounting to the sum of \$200.60, which the defendants by means of the premises became and were liable to pay to whomsoever should be the holder of the tickets, forty days after the drawing. That after the drawing the plaintiff, for a valuable consideration by him paid to the holder of the tickets which drew prizes, purchased the same from him and became and was the owner and holder thereof. That he demanded payment of the prizes of the defendants, which was by them refused. There was no averment or statement in the complaint as to *where* the tickets were originally sold by the defendants, or *where* they were purchased by the plaintiff after the drawings.

The defendants demurred, stating, as ground of demurrer, that by the constitution and laws of the state of New-York, lotteries are unlawful, and declared a nuisance, and the sale of lottery tickets, or any bargain as to the same, prohibited and made void.

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Thatcher *against* Morris.

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Judgment was rendered at special term in favor of the plaintiff upon the demurrer, which was reversed at a general term of the supreme court in the eighth district, and judgment given in favor of the defendants. From this judgment the plaintiffs appeal to this court.

*N. Hill, Jr.*, for the appellant.

*J. H. Patten*, for the respondent.

W. F. ALLEN, J. By the constitution as well as the laws of the state, all lotteries and the selling of lottery tickets are prohibited. Lotteries are declared by law to be common and public nuisances, and the uttering of lottery tickets is made a misdemeanor, punishable by fine and imprisonment. (*Const. art. 1, § 10*; *1 R. S. 665, §§ 33, 36.*)

All contracts and dealings in respect to lotteries and tickets in lotteries being illegal, no right of action can accrue to a party by reason of such contracts and dealings, according to the maxim, *ex turpi causa non oritur actio*. (*Broom's Leg. Maxims*, 350.) If, however, a contract is made and is to be performed without the state, and is valid by the laws of the place where made and to be performed, it would be upheld by the courts of this state, out of respect to the foreign law, and upon principles of comity by which courts are governed, if not contrary to the principles of morality or public policy, although such contract would be illegal within this state. It has been held that contracts made and to be performed without this state in regard to lotteries, being lawful in the state where they were made and to be performed, were not so plainly contrary to morality that our courts could refuse to give them effect. It was suggested that it would be ungracious, after the legislature had authorized lotteries for educational, religious and benevolent purposes, to refuse to uphold contracts in respect to them, upon the ground that they were founded in moral turpitude. (*The Commonwealth of Kentucky v. Bassford*, 6 Hill, 526.)

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The contracts upon which this action is brought, if made within this state by a sale of the lottery tickets by the defendants to the persons under whom the plaintiff claims, are illegal, and cannot be the subjects of an action. The plaintiff, to entitle himself to recover, must show contracts valid by the law of the place where made; and if contracts of this character relied upon are prohibited by the *lex fori*, it is incumbent upon him to state the circumstances which make this case an exception to the rule, as that the contracts were made in a place and under circumstances which rendered them valid and legal. The plaintiff having resorted to the courts of this state to enforce contracts prohibited and made indictable by the law of the state, the subject matters of which are declared to be public and common nuisances, should, by an averment of the place where made, and that by the laws of that place such contracts were authorized, have shown that these contracts were not within the statute and vitiated by it, the laws of the state having no extra territorial force. It is as if an exception had been engrafted upon the statute which prohibits all dealing in regard to lottery tickets, excluding from its operation all contracts made without the state, and the plaintiff, in seeking to enforce a contract within the general statute, must, in pleading, by proper averments bring himself within the exception. (*Chitty's Plead.* 224, 309.) The courts cannot, in the absence of an averment to that effect, for the purpose of upholding a contract conceded to be immoral and declared to be illegal, presume that it was made in some other state or country in which such contracts are still tolerated. Neither is it matter of defense, to be alleged by the defendant, that it was made within the state, and is therefore illegal. The legality and validity of the agreement and the consequent liability of the defendant are to be shown by the plaintiff, by proper averments in the complaint. I do not suppose that the courts are called upon to presume or assume that contracts are made in any particular place when nothing is shown in that behalf; but if any presumption is to be indulged, it must be that the transaction which is the foundation of the action occurred within the juris-

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*Thatcher against Morris.*

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diction in which it is sought to be investigated, and the legal liabilities resulting from it enforced. The question of where made, if material to give validity to the contract, or to aid in its construction, is for the jury upon the evidence, and like every other fact should be averred in pleading, that the judgment may be in accordance with the allegations as well as the proofs of the parties. The determination of the issues of fact presented by the pleadings, should settle the judgment to be given, and the issues should be so framed that an inspection of the record shall disclose the ground of the judgment. But in a case like the present, if the plaintiff is correct in his positions, the rights of the parties may, and probably do, depend upon a question of fact entirely outside of the pleadings, and the plaintiff's right to recover depends mainly upon a fact not alleged, and one therefore which the defendant is not called upon to controvert by answer. The place of the making of the contract is so intimately connected with the case of the plaintiff, and so material to his right to maintain the action, that its affirmation was essential to the validity of his complaint. The plaintiff in his complaint has therefore failed to show a valid and legal contract from which a liability can result on the part of the defendants, and the judgment of the supreme court must be affirmed with costs.

GARDINER, Ch. J. The plaintiff makes title to the prize money in controversy, by virtue of a lottery ticket, which he alleges in his complaint that he acquired subsequent to the drawing of the lottery in the state of Maryland; but without averring *where* the purchase was made. The instrument purchased was a part of the machinery for carrying on a business which our law pronounces a common and public nuisance. If a party institutes a suit in the courts of this state, upon a contract express or implied originating in such a source, he is bound to show on the face of his complaint, that his title was acquired in a jurisdiction where gambling was authorized by law. He seeks his remedy in a state where this species of it is a public and



*Vassar against Camp.*

common nuisance, and he fails to show a title to relief when the most favorable statement he can make of his claim, leaves it doubtful whether it is within or an exception to the general rule. The affirmative is with him in pleading as on a question upon evidence. He cannot recover by showing that the chances in favor or against his demand are about equal. He should, on paper, at all events, incline the balance in his own favor.

I think the judgment should be affirmed.

Judgment accordingly.

*of Vassar Jim. Case.*  
**VASSAR and others against CAMP and others.**

Where one party proposes by mail a contract with another residing at a distance, and the latter accepts it and deposits his acceptance in the post office, addressed and to be transmitted to the former, the contract is complete.

The party may make it a condition that the proposed contract shall not be obligatory upon him until he receives notice of its acceptance, or unless he receives such notice by a specified time; but if he do not, the contract is binding on him from the time the acceptance is deposited for transmission to him by mail, although he never receive it.

Accordingly where merchants residing at Sacket's Harbor forwarded by mail to brewers at Poughkeepsie a proposed contract, signed by the former, to purchase and deliver to the latter barley, with a counterpart to be signed and returned by them, if they accepted the proposal, and the latter, on the receipt of the proposed contract, accepted it and signed the counterpart and deposited it in the post office at Poughkeepsie, in a letter of acceptance directed and to be transmitted by mail to the former at Sacket's Harbor; *Held*, that the deposit of the acceptance and counterpart in the post office consummated the contract, and that it was obligatory on the parties making the proposal, although they never received the acceptance.

**ACTION** to recover damages for the breach of an alleged contract to deliver ten thousand bushels of barley.

On the trial of the cause at the Dutchess Co. circuit, before Justice Barculo, it was proved that the plaintiffs were brewers, doing business at Poughkeepsie, and the defendants merchants and produce dealers at Sacket's Harbor; that on the 22d of Au-

*offer*  
*Camp* Vassar against Camp.

gust, 1850, the defendants addressed and forwarded to the plaintiffs at Poughkeepsie, by mail, a letter dated on that day, at Sacket's Harbor, in which they say, "We will undertake to deliver you at Albany, between the 1st and 20th October next, from 5000 to 10,000 bushels of first quality Jefferson county barley of this year's growth, at  $67\frac{1}{2}$  cents per bushel, and weighing not less than 48 lbs. per bushel. It being understood that if this offer shall be accepted, speedy notice of the same be given us;" and that on the 26th of the same month the plaintiffs wrote and forwarded to the defendants by mail a letter in which they say, "Yours of the 22d inst. is before us, and in reply we accept of your offer for ten thousand bushels Jefferson county barley, and herewith enclose a contract for the same, signed by us, with duplicate; the latter ~~you will execute~~ and return by the next mail."

*Contract* This letter contained a contract signed by the plaintiffs, and a duplicate thereof to be signed by the defendants, which duplicate was in the words following: "Sacket's Harbor, August 26, 1850. For and in consideration of one dollar to us in hand paid by M. Vassar & Co., the receipt whereof is hereby acknowledged, we hereby agree to deliver them in the city of Albany, on or before the 20th of October next, ten thousand bushels of first quality Jefferson county *two-rowed* barley, of this season's growth, to weigh not less than 48 pounds per bushel, at sixty-seven and a half cents per bushel, ( $67\frac{1}{2}$ -100) cash on delivery. Measuring divided as usual."

On the 30th of August the defendants forwarded to the plaintiffs by mail a letter dated that day, in which they say, "Your favor of the 26th instant reached us this day. By reference to our proposal you will perceive that it was not restricted to any one particular kind of barley, except 'first quality Jefferson county barley.' We have therefore enclosed the contracts you sent us, and sent you others with our signature and a duplicate for you to sign and send us. We have extended the period of delivery to the 30th of October, as there will be at least ten days' delay from the date of your letter before we can receive and act upon

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*Vassar against Camp.*

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your reply. As soon as received, we shall send amongst the farmers and secure the first lots, even at an extra price, and when not threshed out, shall caution them against breaking the barley as little as possible."

In this letter the defendants re-enclosed to the plaintiffs the contract and duplicate received from them, without signing the latter, and forwarded to the plaintiffs a proposed contract signed by the defendants, dated August 30, 1850, in the same language as the duplicate above set forth, omitting the words "two-rowed" and inserting 30th of October instead of the 20th, as the time for the delivery, with a duplicate thereof to be signed by the plaintiffs. This last mentioned letter, with the enclosures, was received by the plaintiffs on the 3d or 4th of September, and they signed the duplicate received by them, enclosed it in a letter which they addressed to the defendants at Sacket's Harbor, and on the 4th of September deposited this letter, so addressed, in the post office at Poughkeepsie. In this last mentioned letter, as appeared by a copy thereof retained by them, the plaintiffs said, "Yours of the 30th ultimo, enclosing contract for 10,000 bushels of barley, was received this morning, and herewith return the duplicate signed by us. Your correction in regard to its being purely of the two-rowed kind was perfectly right, although in our letter of the 26th inst. it did not occur to us that your county raised any other kind of barley, to any very considerable extent. We have no objection to receiving either kind, provided it has been grown together; but if it comes separately we expect you will keep it apart, it being quite difficult to malt it when mixed, grown on different farms. We are glad to notice your remark respecting care in selecting good qualities, and especially the caution to your farmers toward breaking the kernels in the process of threshing."

On the 14th of September the defendants wrote to the plaintiffs, referring to the letter of the former of the 30th of August, stating that they had been daily expecting and awaiting a reply, but had received none, and that there had been so much delay that it would be then difficult to purchase in Jefferson county

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*Vassar against Camp.*

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the proposed quantities of first quality barley, as purchasers had within a few days previous been among the farmers and engaged a large portion of the crop, and requesting that the proposed contract forwarded to the plaintiffs on the 30th of August be returned. To this the plaintiffs, under date of 19th September, replied, stating what they had done on the 4th of September, as herein before stated. By subsequent letters the plaintiffs insisted that there was a valid contract which the defendants should fulfill, which the latter denied.

The defendants gave evidence tending to prove that the letter of the 4th of September, with the counterpart of the contract signed by the plaintiffs, was never received by them, or their agents or clerks, and that they had no knowledge or notice that the plaintiffs had assented to or signed the same until the receipt of their letter of the 19th of September; and that the defendants were in a situation and ready to have performed the contract, and could have done so with profit, if they had received the counterpart signed by the plaintiffs, or had notice that they assented to the contract, at any time prior to about the middle of September.

The plaintiffs gave evidence tending to prove that the letter of the 4th of September was received by mail, at the post office at Sacket's Harbor, and placed by the postmaster in the letter-box of the defendants in that office.

The jury, in response to written interrogatories submitted to them by the court, found "that the letter of the plaintiffs of the 4th of September, containing the counterpart and addressed and deposited as hereinbefore stated, was transmitted by mail to the post office at Sacket's Harbor, and was there deposited by the postmaster in the letter-box or drawer of the defendants in said office, on or about the 7th day of September aforesaid; and that there was no sufficient evidence that the defendants ever received such letter;" and also assessed the amount of damages in the event that the plaintiffs were entitled to recover. Thereupon the said justice ruled and decided that the contract was obligatory upon the defendants, and ordered judgment for the plaintiffs for

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the amount of the damages assessed ; and the counsel for the defendants excepted. This judgment was affirmed by the supreme court at general term, in the second district. The defendants appealed to this court.

There were other questions litigated and decided, distinct from the question whether or not there was a valid contract ; but they were peculiar to the facts of this case, and not of general interest.

*J. A. Spencer*, for the appellants.

*C. Swan*, for the respondents.

SELDEN, J. The first and most important question presented in this case is : Did the contract, for the delivery of 10,000 bushels of barley, at the city of Albany, ever become obligatory upon the defendants ; and if so, at what time ?

It is insisted, on the part of the plaintiffs, that a contract was consummated by the correspondence between the parties, irrespective of either of the formal agreements signed by them respectively ; that the proposition made by the defendants, under date of the 22d of August, was distinctly and unequivocally accepted by the plaintiffs in their letter of the 26th ; and that the contract thus perfected having been subsequently embodied in the agreement dated August 30th, takes effect from the 26th, when the offer was accepted. There are, however, two conclusive objections to this position. First. It is evident, from the correspondence, that there was no concurrence of the parties as to the precise terms of the contract, until the mutual execution of the written agreement, dated August 30th. The letters on one side mentioned only "first quality Jefferson county barley," while those on the other spoke of "two-rowed" barley. That this discrepancy in the views of the parties continued up to and after the 26th, is proved by the enclosures in the plaintiff's letter of that day. The general acceptance of the defendant's offer, in the commencement of that letter, is qualified by the terms of the written contract enclosed, showing how the plaintiffs

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understood the offer. The plaintiffs cannot be held to have assented by that letter to any contract, except that which was embodied in the written agreement enclosed, to which the letter itself referred. The two must clearly be construed together. But, again, if the parties had entirely agreed upon the terms of the contract, in their previous correspondence, the change in the written agreement of the 30th of August, in regard to the time for the delivery of the barley, made that a new contract, to take effect from the time of its adoption, and superseded the previous arrangement.

The real question then is, as to the validity of the agreement dated August 30th, and as to the time when it took effect, if at all. This agreement was signed by the defendants, and transmitted by them on the day of its date, by mail, to the plaintiffs, with a counterpart to be signed by the latter and returned. The plaintiffs received the documents on the 4th of September, signed and enclosed the counterpart, and deposited it in the mail the same day, addressed to the defendants at Sacket's Harbor, where they resided. Was any thing more necessary to complete the agreement; did the contract become obligatory upon the deposit of the counterpart in the mail, duly executed by the plaintiffs, or was its receipt by the defendants, or notice to them of its execution, essential to its validity?

This precise question has been so fully considered, in several modern cases, that it would be a work of entire supererogation to discuss it here. It arose in England in the case of *Adams v. Lindsell*, (1 *Barn. & Ald.* 681.) In that case an offer to sell wool was made through the mail. The offer was received by the plaintiffs on the 5th of September, who wrote and mailed their answer, accepting the offer, the same evening; but this answer was not received until the 9th of September by the defendants, who, in the meantime, supposing their offer had not been accepted, had sold the wool to other parties. The action was for the non-delivery of the wool; and if the contract was regarded as consummated on the 5th of Sept., when the answer accepting the offer was mailed, the defendants were liable; but if not until its

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receipt on the 9th, then no liability attached. The court held unanimously that the contract became obligatory on the 5th, ~~when the~~ answer of the plaintiffs was deposited in the mail. In the case of *Mactier v. Frith*, (6 *Wend.* 103,) the same question arose in this state, and was very elaborately discussed by our late court of errors. The court in that case, by an almost unanimous vote, affirmed the doctrine of *Adams v. Lindsell*, in opposition to that of *McCulloch v. The Eagle Insurance Co.*, (1 *Pick.* 278,) in which the supreme court of Massachusetts had adopted a different rule. The decision in *Mactier v. Frith* has since been followed in our own state in the case of *Brisban v. Boyd*, (4 *Paige*, 17;) in the state of Connecticut, in the case of *Averill v. Hedge*, (12 *Conn.* 424;) in Pennsylvania, in the case of *Hamilton v. Lycoming Ins. Co.* (5 *Barr.* 339;) and in Georgia, in *Levy v. Coke*, (4 *Georgia R.* 1.)

The question has also again arisen in England, and been passed upon by the house of lords there, in the case of *Dunlop v. Higgins*, (12 *Jurist*, 295.) In that case, the case of *Adams v. Lindsell* is referred to and confirmed in the most decided and unequivocal terms. The doctrine of this case, therefore, and that of *Mactier v. Frith*, (6 *Wend.* 103,) must be considered as too firmly settled, both in this country and in England, to be shaken or doubted. It is moreover maintained, in the cases referred to, by the most satisfactory and conclusive reasoning. no!

But it is insisted by the defendants' counsel, that this case is taken out of the rule by the concluding clause in the defendant's letter of the 30th August, which is in these words, viz: "We have extended the period of delivery to the 30th of October, as there will be at least ten days' delay from the date of your letter, before we can receive and act upon your reply. As soon as received, we shall send amongst the farmers and secure the first lots, even at an extra price, and where not threshed out, shall caution them against breaking the barley as little as possible." The idea advanced is, that this clause, taken in connection with that in the defendants' letter of the 22d August, in which they say, "It being understood that if this offer be accepted, speedy

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notice of the same be given us," is equivalent to an express condition, that the defendants would be bound from the time when *they should receive* notice of the plaintiffs' acceptance, and not before.

But this position gives, I think, a force and an interpretation to those clauses which was never intended, and which they will hardly bear. The clause in the letter of the 22d August cannot with propriety be supposed to refer to any other than a notice by mail, through which the whole negotiation was no doubt expected to be, and was in fact conducted. When a notice is to be given by mail, in most cases if not in all, it is sufficient for the party giving notice to deposit in the mail. He can do nothing more to insure its safe delivery, and is not responsible for its miscarriage. In regard to the clause in the letter of the 30th August, it appears to me plain, that it was not intended and cannot be construed as fixing the time when the contract should become obligatory, but as expressive merely of the promptness with which the defendants *designed to act*, upon receiving notice that their offer was accepted. Something less equivocal than this, should be required to change a fixed and settled rule of law.

My conclusion therefore is, that the contract was perfected, and became obligatory upon all the parties, on the 4th of September, when the counterpart was deposited in the mail, and not before. It being a contract purely prospective, having no relation to any thing past, the antedating has no effect whatever upon the time of its inception.

DENIO, J. [After discussing the other questions.] I come, therefore, to the inquiry whether there was in fact any contract really concluded between the parties for the sale, or for the procuring and delivery of barley by the defendants to the plaintiffs. There cannot be any dispute about the facts. The correspondence prior to the 30th August, is only material for the purpose of determining who the contracting parties were, and as explanatory to what afterwards took place; for the defendants, by their letter of that date, inserted in the proposed contract a substantial alteration of the terms which the plaintiffs had proposed,



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which prevented it from amounting to an acceptance of the contract which the plaintiffs had offered to enter into. That letter was, therefore, a fresh proposal, and amounted to nothing unless it should be assented to by the plaintiffs. On the day the plaintiffs received it by mail at Poughkeepsie, they subscribed the brief contract enclosed in it, which they re-enclosed in a letter addressed to the defendants at Sacket's Harbor. That letter, with its enclosure, arrived at its destination by due course of the mail, and was placed, by the postmaster, in the defendants' drawer at the post office. It was afterwards lost, without actually reaching the hands of the defendants. I do not see the slightest reason to doubt the entire integrity of the defendants. They had no motive for suppressing the letter if they had received it, but a strong one for acknowledging and acting upon it. The loss of the letter was a misfortune, by means of which some two thousand dollars were lost; and the question is upon which of these parties the law casts the burthen of that loss. This depends upon the question whether a binding and operative executory contract resulted from the facts which have been mentioned; for if such a contract was effected, the plaintiffs were entitled to the benefit of it, though the breach on the part of the defendants was not willful or designed, but was the result of accident and misfortune. Where two parties, both being present together, enter into negotiations looking to the making of a contract, the minds of both must ordinarily meet at the same time upon the same identical terms, or no contract is made. Where the parties reside at a distance from each other, and the negotiation is conducted by written correspondence, though there must be the assent of both parties to the same provisions, it is of course impracticable that such assent should be manifested simultaneously. One must state what he is willing to agree to, and the other must, when the proposition has reached him, assent to the same terms, and in some manner manifest that assent. Prior to the case which I am about to mention, the authorities were supposed to leave it doubtful whether a contract was created by the assent of the party to whom the proposal was made, until the

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cont. evidence of such assent had actually come to the knowledge of the party who had made the proposal. That doubt was put at rest by the decision of the court for the correction of errors, in *Mactier v. Frith*, (6 *Wend.* 106.) Two persons were joint owners of a cargo of brandy which had been shipped on their account in France for the port of New-York. Frith, one of the parties, resided at St. Domingo, and Mactier, the other joint owner, resided in New-York. Frith, while the cargo was supposed to be at sea, wrote to Mactier, proposing that the latter should take the adventure solely on his own account. While that offer remained open, and after the brandy had arrived in New-York, Mactier wrote to Frith that he had decided to take the adventure on his own account, and had credited him, Frith, with the invoice. The letter was forwarded, but before it could reach Frith, Mactier died, and a controversy arose between Frith and the representatives of Mactier, as to the ownership of Frith's original share of the cargo. The determination of this controversy depended upon the question whether a contract of sale had been consummated before Mactier died. The court held, reversing a decree of the chancellor, that such a contract had been concluded. The principle established was that it was only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act; that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent. The court therefore held that the property in the brandies passed in Mactier's lifetime.

It would answer no useful purpose to review the antecedent authorities which were examined and considered in that case. Being a judgment of the court of last resort, it is high evidence of the law, and necessarily decides the question now before us, unless there is a material distinction in principle between the two cases. The contract in the case of *Frith v. Mactier* was an executed one; but the alleged agreement here was executory. I do not perceive that this constitutes a distinction favorable to

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the defendants. If such facts would constitute a contract which would pass the title to property, there is no good reason for holding that it would not be sufficient to bring into existence an executory undertaking, binding the parties by way of agreement.

The defendants' counsel however maintains that by a fair construction of the proposition made by the defendants in their letter of the 30th of August, it was made a condition that the contract should not become operative until the plaintiffs' assent had actually come to the knowledge of the defendants. Notwithstanding the rule of law which I have considered as settled by the judgment of the court of errors, I do not doubt but that a party proposing to contract may make it a condition that no bargain shall arise or be consummated until the affirmative answer of the other party shall be actually received by the party proposing. The question then is whether such a condition is found in this letter. It is not so stated in terms. By the next preceding letter of the plaintiffs they had proposed the 20th of October as the time for the delivery of the barley. The defendants changed the time by extending it ten days; till the 30th of October. For this change they give the following reason: "We have extended the period of delivery to the 30th of October, as there will be at least ten days delay from the date of your letter before we can receive and act upon your reply." There is nothing in this, as it seems to me, indicative of an intention to shift the consequences of a miscarriage of a letter from the plaintiffs to the defendants. It is apparent that no idea of the loss or miscarriage of the plaintiffs' expected letter was in the minds of the defendants. They counted on the fidelity of the mails and of the officers of the post office, and as a delay in completing the contract had arisen from the modification of the terms, they proposed a later period for the delivery of the barley corresponding with that delay. To create a distinction which should be sufficient to take a case out of the rule of law to which I have referred, the condition should be explicitly stated, so that the party to whom the proposal is made, may, should he think proper, dispatch a messenger or take some other method of performing the

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condition by bringing the acceptance home to the knowledge of the other party. But the letter proceeds: "As soon as received, that is, [the answer,] we shall send among the farmers and secure the first lot," &c. This remark conveyed no intimation to the plaintiffs that a condition was intended to be annexed, which would change the ordinary rule of law. It seems to have been made in order to show the plaintiffs the kind of diligence and energy with which they intended to execute the contract. They had placed the time of delivery so remote as to afford them time to purchase and forward the barley after the receipt of the acceptance, taking into account the ordinary delays of the mail. That the mail was contemplated as the medium of transmission is perfectly plain from all the letters, and especially from the subsequent ones written by the defendants, in which they suggest that the miscarriage has been occasioned by an error in that department. Such delays the defendants took into consideration and provided for, but they made no suggestion as to what was to be the consequence of the miscarriage of a letter, simply because no such circumstance had crossed their minds. Upon the whole case, I am of opinion that the contract became operative when the plaintiffs signed the duplicate contract and placed it in the post office addressed to the ~~plaintiffs~~ <sup>defendants</sup>, and that the accident by which the letter failed to come to the actual knowledge of the defendants was the misfortune of the defendants and not of the plaintiffs. I am consequently in favor of affirming the judgment of the supreme court.

Judgment accordingly.

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*Lester against Jewett.*

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LESTER *against* JEWETT.

Where a party by an instrument in writing signed by him, and dated the 6th of September, 1839, for value received, agrees to purchase of another at the expiration of one year from the date of the instrument, stock at a price named, the sale and transfer of the stock and the payment of the price are dependent acts to be concurrently performed.

To entitle the vendor to recover upon the agreement, he must aver and prove a tender, or offer to sell and transfer the stock to the party contracting to purchase, at the expiration of the year.

A count averring that he was ready and willing to sell and transfer the stock at the time named therefor in the instrument, is bad on demurrer.

But a count upon the agreement which averred that the vendor was ready and willing, and at the expiration of one year from the date of the instrument, to wit, on the 7th of September, 1840, offered to the purchaser to sell and transfer to him the stock, is sufficient.

Where the time stated under a *videlicet* is repugnant to the previous allegation, it will be rejected.

**ASSUMPSIT**, commenced in 1846. The declaration contains five counts upon an instrument signed by the defendant in the following words: "For value received, I agree at the expiration of one year from this date, to purchase thirty shares of the capital stock of the Southern Life Insurance and Trust Company, of Ralph Lester of the city of Rochester, for the sum of three thousand dollars. Dated September 6th, 1839. (Signed,) Simeon B. Jewett." Neither the 1st, 2d, 4th or 5th count contained any averment of an offer or tender of the stock to the defendant. In each of these counts it is averred, that although he the said plaintiff hath always been ready and willing to sell and transfer unto the defendant the said thirty shares of the capital stock of said company, for the said sum of three thousand dollars, yet the defendant, although often requested so to do, hath not purchased from the plaintiff said thirty shares of stock for the sum aforesaid, but hitherto has, and does refuse so to do. The third count averred "that the plaintiff has at all times, since the making of said instrument, been ready and willing, and at the

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*expiration of one year from the date of said instrument, to wit, on the 7th day of September, 1840, to wit, at Rochester aforesaid, offered to the said defendant to sell and transfer to him the said thirty shares of the capital stock of said company for the sum aforesaid. Yet the said defendant did not at the expiration of one year from the date of said instrument, nor at any time, although often requested so to do, purchase."*

The defendant demurred separately to each count, and assigned with other causes of demurrer, that it is not stated or averred in said counts that the plaintiff, at the expiration of one year from the date of the instrument therein mentioned, or at any time before the commencement of the suit, *tendered* to the defendant, or *offered* to sell or transfer to him, the said thirty shares of stock. The plaintiff joined in the demurrers, and the supreme court, sitting in the seventh district, gave judgment thereon in favor of the defendant. (*See 12 Barb. 502.*) The plaintiff appealed to this court.

*John H. Reynolds, for the appellant.*

*H. R. Selden, for the respondent.*

EDWARDS, J. If the instrument upon which this suit is brought be construed according to the plain rules of common sense, without regard to legal subtleties and refinements, it seems to me, that there can be but little difficulty in coming to a conclusion as to its true meaning and effect. The defendant agrees to purchase thirty shares of stock, on a particular day, at a fixed price. No credit whatever is given. Now, what is he bound to do in order to make such a purchase? He certainly is not bound to pay the price agreed upon, without receiving any thing in return. A cash purchase can only be made by a payment of the purchase money on the one side, and a delivery of the thing purchased on the other. These are, and must necessarily be concurrent acts. The purchaser is not bound to pay the purchase money unless he receives the thing purchased ;

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and how can it be said that he has refused to receive the thing purchased, and to pay the money for it, when he has never had the opportunity of receiving it? I cannot perceive how a person can be said to be in default for not doing a thing, when the party who alleges his default, and who alone could put it in his power to do the thing, has neglected to do so.

There is, undoubtedly, a great discrepancy in the reported cases in which the question has arisen whether covenants and promises were dependent or independent; or, perhaps, the proposition may be more correctly stated by saying, that many of the older cases have neither been approved of, nor followed, in the modern decisions. The case of *Turner v. Goodwin*, (10 *Mod.* 153, 189, 222,) which is somewhat analogous to the one under consideration, was cited and relied upon by the plaintiff. That was an action of debt upon a bond for £3000, conditioned for the payment of £1500. The condition recited that whereas Dibble was indebted to Turner on a bond for £3000, conditioned for the payment of £1500, and had recovered judgment for his money; Goodwin, upon consideration that the plaintiff would forbear suing out execution against Dibble, promised to pay the money to Turner upon request, he assigning over to Goodwin the judgment he had against Dibble. The defendant pleaded in bar that the plaintiff had not assigned the judgment; the plaintiff replied that he was ready to assign. The court were divided in opinion upon the first argument of the case, but upon the third argument gave judgment for the plaintiff. In giving their opinion they say, that "Although the obligor be not bound to part with his money, unless the judgment be at the same instant assigned to him, yet he is bound to seek out the obligee, bring the money, and tell him, 'Sir, here is your money if you will assign the judgment.'" It will be observed that the court admit that the defendant was not bound to pay his money until the judgment was assigned to him; that is, that there would not be a breach of the covenant to pay the money until an assignment of the judgment had been made or tendered; but they say that the defendant cannot avail himself of that fact without seeking

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for the plaintiff, bringing the money, and telling him that it is ready. In 20 *Vin. Abr.* 183, *Tender*, [E.] p. 9, it is said, that Lord Macclesfield, in alluding to this case, "declared that where there are no words to determine the priority of the acts, a middle way is to be chosen. The party is not obliged to make an absolute tender of the money first, but by such words as these, I tender you the money so you make an assignment." It is sufficient to say that this case has not been followed, and in no other case has any "middle way" been suggested. But a much more sensible and practical rule has been laid down even in cotemporaneous cases. In the case of *Callenonel v. Briggs*, (1 *Salk.* 112,) there was an agreement that the defendant would pay a certain sum of money, in six months after the bargain, the plaintiff transferring stock. Holt, Ch. J., said: "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer, or a tender, and the other a payment, or a tender; for transferring in the first bargain was a condition precedent, and though these be mutual promises, yet if one thing be the consideration for the other, then a performance is necessary to be averred. If I sell you my horse for £10, if you will have the horse, I must have the money; or if I will have the money, you must have the horse." Therefore, the report says, "he obliged the plaintiff either to prove a transfer, or a tender and refusal within six months." In the case of *Thorpe v. Thorpe*, (1 *Salk.* 171,) the same learned justice laid down the rule "that in executory contracts if the agreement be that the one shall do an act, and for the doing thereof the other shall pay, &c., the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay." (See 1 *Vent.* 147, 177, 214; *Pordage v. Cole*, 1 *Saund.* 820 d, note 4, sub. 5.) At a later period, in the case of *Gooddisson v. Nunn*, (4 *T. R.* 761,) where A. had agreed to sell B. his estate for a certain sum of money on or before a particular day, in consideration whereof B. agreed to pay that sum on or before the day,



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and in case of failure, to pay £21; it was held that the covenants were dependent, and that A. could not recover the £21 without showing a conveyance on his part, or a tender of one; and Lord Kenyon, in giving his opinion, said that "the old cases cited by the plaintiff's counsel have been accurately stated, but the determinations in them outrage common sense." And Grose, justice, says, "notwithstanding some of the old authorities, the courts of later years have considered whether, in reality, the first act is not to be performed by the seller, or, at least, whether they are not *concurrent acts*. There is so much good sense in the later decisions that it is too much to say that they are not law." In the case of *Kingston v. Preston*, (2 Doug. 690,) the defendant agreed to give up his business on a particular day, and the plaintiff agreed to give security for the payment of a sum of money. The plaintiff averred that he had been ready to perform his covenants, and assigned for breach a refusal on the part of the defendant to perform his. The defendant pleaded 1, that the plaintiff did not *offer* sufficient security; and 2, that he did not *give* sufficient security. The plaintiff demurred to both pleas, and judgment was given for the defendant. Lord Mansfield, in delivering the opinion of the court, said, that "there are three kinds of covenants; 1. Such as are called mutual and independent. 2. There are covenants which are conditions and dependent. 3. There is also a third sort of covenants which are *mutual condition*. to be performed at the same time; and in these if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not *certain that either is obliged to do the first act*." The latter decision refers to that class of cases in which the acts agreed to be done are concurrent, as in the case before us. He then lays down the general rule, that "the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that, however transposed they may be in the deed, their precedency must depend upon the order of time in which

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the intent of the transaction requires their performance." In the case of *Bank of Columbia v. Hagner*, (1 *Peters*, 455,) in which there was a contract for the sale of land, by which one agreed to purchase, and the other to convey, the covenants were held to be dependent; and Thompson, J., says, that "in contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced from him, and yet be disabled from procuring the property for which he paid it." In the case of *Dana v. King*, (2 *Pick.* 156,) Ch. J. Parsons says, "where two parties contract to do each a certain thing to the other on the same day, and the thing to be done by the one is the consideration for that which is to be done by the other, the one who would compel a performance must show an offer and a readiness to do what is to be done on his part." If we apply the principles thus laid down to the present case, it seems to me that we can come to no other conclusion than that the acts which the parties are bound to perform are concurrent, and neither can recover against the other for non-performance of the contract, unless he avers an offer or tender of performance on his part. But we have decisions in the courts of this state in cases almost identical with the one before us. In *Payne v. Lansing*, (2 *Wend.* 525,) the declaration alleged a promise by the defendant, that as soon as a certain judgment was rendered he would take an assignment of it, and pay to the plaintiff the amount thereof, &c. The court say, that the plaintiff's cause of action was not perfect until he had offered to assign the judgment. In *Johnson v. Wygant*, (11 *Wend.* 48,) the declaration alleged that the defendant covenanted and agreed to purchase of the plaintiff a certain lot of land for a sum stated, payable in three equal annual installments, with interest, yet that the defendant not regarding his covenant, had not paid, &c. The court held that the payment of the last installment of the whole consideration money, and the giving of the deed, were to be concurrent acts;

and they say, that "it is well settled that covenants like these are dependent, and that neither party can recover against the other without averring a tender of performance on his part. A mere readiness to perform is not sufficient. If the vendor sues for the consideration money, he must aver a tender of such deed as by the terms of the contract he was to give. If the action is brought by the vendee against the vendor for not conveying, he must aver a tender of the consideration money before suit brought." It follows then that where there is a contract to purchase, like the one in question, the vendor is not entitled to recover for a breach of it, until he has made a tender of performance on his part. If it were otherwise, the defendant would be compelled to pay for what he has never received, and never had the opportunity of receiving, and what the plaintiff may never have had it in his power to deliver.

It is contended, however, that this case is distinguishable from those which have been cited, inasmuch as the agreement to purchase is founded upon a valuable consideration. But how can that alter the nature of the contract? The question is not whether the defendant is bound to perform his contract. His obligation to purchase according to its terms is admitted. The true and the only question is, what is the defendant bound to do in order to perform his contract? or, rather, under what circumstances will he be considered in default for its non-performance? The first, second, fourth and fifth counts do not contain any allegation of an offer or tender of performance on the part of the plaintiff, and they are for that reason defective.

The instrument in question is dated on the 6th of September, 1839, and the agreement was, by its terms, to be performed at the expiration of one year from its date. The third count alleges an offer of performance, and it states that the offer was made at the expiration of one year from the date of the instrument, to wit, on the 7th day of September, 1840. It is contended on the part of the defendant that the 7th of September was after the expiration of a year from the date of the contract, and that, for that reason, the third count does not contain a sufficient allega-

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tion of an offer of performance. In the case of *Bynner v. Russell*, (1 Bing. 23,) an action was brought upon a bill of exchange, and the declaration, after stating the delivery of the bill to the plaintiff, averred that afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 31st day of March in the year 1822, the said bill of exchange was in due manner and according to the usage and custom of merchants presented for payment. To this there was a special demurrer, and cause was assigned that the 31st day of March, 1822, was Sunday. The court held that even on special demurrer the day was immaterial, being specified under a *to wit*, and in an averment that the bill was presented for payment when it became due and payable. In the present case there is an averment that the offer was made at the expiration of the year, as required by the contract, and if a different day be stated under a *videlicet* it is inconsistent with the previous allegation, and should be rejected as surplusage. (See also *Vail v. Livingston*, 4 John. 450; *Gleason v. McVicker*, 7 Cowen, 42.)

I think that the judgment of the supreme court should be reversed, and judgment given for the plaintiff on the third count, and for the defendant on the other counts, with leave to each party to amend.

JOHNSON, J., delivered an opinion to the same effect.

DENIO, J., having been counsel in the cause, and RUGGLES, J., not having heard the cause argued, took no part in the decision. The other judges concurred in the foregoing opinions.

Judgment accordingly.

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Marshall *against* Guion.

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MARSHALL *against* GUION and another.

Section 224 of the act of 1813 reducing the laws relating to the city of New-York into one act, (2 R. L. 428,) is not applicable to the construction of a pier, where the corporation owns the lots opposite the place where it is to be built.

In such a case the corporation has authority to construct the pier at the expense of the city, and take the emoluments arising from it for its benefit.

Where the corporation granted to an individual a water lot on the East river, and he covenanted to construct in front of it, on the river, a street which should be and remain a public street of the city, and did so, and the corporation covenanted that the grantee should enjoy the wharfage arising from the bulk head created by the street which for a time he received; and subsequently the corporation acquired title to the granted premises pursuant to §§ 177 and 178 of the act of 1813 for the purposes of a street; and afterwards the corporation directed to be constructed opposite these premises a pier which thenceforth formed the side of a public slip, which pier was built at the joint expense of the corporation and the proprietors of lots adjacent to said granted premises, and the emoluments therefrom were shared between them and the city in certain proportions: subsequently the corporation directed this pier to be extended into the river, and invited the said proprietors to unite in constructing the extension, the expense and emoluments thereof to be borne and shared in the same proportion as were those of the original pier which they refused to do, and the corporation at the expense of the city extended the pier; *Held*, that the corporation had authority to do so, and that the wharfage arising from this new portion of the pier belonged to the corporation.

REPLEVIN commenced in the New-York common pleas in 1848, by Marshall, to recover from Guion and Vultee two sofas, alleged to have been wrongfully taken by them from the ship *England*, lying at a wharf in New-York, in June of that year. The defendants pleaded *non cepit*; and put in an avowry and cognizance, by which they set up that the mayor, aldermen and commonalty of the city of New-York were the owners of pier No. 23 in the East river; that they by indenture of lease demised unto Guion the rates and fees from ships and vessels exceeding five tons burthen which should use, come to, or lie at said pier; that the ship *England* during a time mentioned was made fast to and used the pier, and was of 720 tons burthen, and that there was

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due for the wharfage of the vessel to Guion \$20.25, which the plaintiff, being the owner of the vessel, refused to pay, and thereupon Guion issued a distress warrant to collect the same, which Vultee as his bailiff executed, by seizing the sofas which were in the vessel then lying at said pier. The plaintiff replied, taking issue upon the averment of title to the pier.

The cause was tried three times in the common pleas. On the first trial the defendants had judgment, which was reversed by the supreme court. (*See 4 Denio, 581.*) On the second trial, verdict and judgment were rendered in favor of the plaintiff, and the defendants appealed to the court of appeals. This judgment was reversed by the court of appeals, on technical grounds, and a new trial ordered. The cause was again tried in the common pleas in 1850.

On this last trial it was proved or admitted that the sofas were taken as stated in the declaration, and that such taking was by virtue of the distress warrant mentioned in the avowry and cognizance, as therein alleged; that Guion was the lessee from the corporation of all rates and fees which might or should accrue or belong to it arising from pier No. 23, and that the wharfage for which the distress was made accrued thereat, a part being for the use of the northeasterly side of the pier on the new part or extension thereof, and the residue for the use of the outer end thereof. The only question made in this court was as to the title of the corporation and its lessee to this wharfage, and touching this question the following facts appeared.

On the 14th of January, 1804, the mayor, aldermen and commonalty of the city of New-York conveyed to Francis Lewis and others, described as executors of the will of Robert Crommelin, reserving a ground rent of \$50 per annum, premises described in the deed "as all that certain water lot, vacant ground or soil under water to be made land and gained out of the East river, situate and being between Front street and South street, in the city of New-York; bounded northwesterly by Front street; southwesterly by another lot of ground, granted or to be granted to Joanna Livingston; southeasterly by South

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street ; and northeasterly by another water lot or vacant ground, granted or to be granted to Sands Ferris and another : containing in breadth on Front street and South street fifty feet each, and in depth from Front to South street, on the northeasterly side, one hundred and forty-seven feet seven inches, and on the southwesterly side one hundred and forty-eight feet." The premises conveyed were, at the time, covered by the waters of the East river, and South street was not in existence, but was a contemplated street to be constructed on the exterior of and adjoining the premises conveyed on the river side. The said conveyance contained the following covenants, viz : " And that they, the said grantees, their heirs and assigns, or some or one of them shall and will, at his, her and their own proper costs, charges and expenses, build, erect, make and finish, or cause to be built, erected, made and finished, within three months next after he or they shall be thereunto required by the said grantors or their successors, a good, sufficient and firm wharf, or street, of seventy feet in breadth, to be called South street aforesaid, in front of and contiguous to the southeasterly end or part of the said premises hereby granted, the whole breadth thereof fronting on the East river aforesaid ; and also, that they, the said grantees, their heirs or assigns, or some or one of them, at his, her or their own proper costs, charges and expenses, shall and will uphold, sustain and keep in good order and repair the said wharf or street, of seventy feet in breadth, called South street aforesaid ; and that the said wharf or street, of seventy feet, called South street, shall be and remain a public street or highway, for the inhabitants of the said city and all others passing or repassing through or by the same, in like manner as the other public streets of the said city now are, or lawfully ought to be. And the said grantors, for themselves and their successors, do covenant and agree to and with the said grantees, their heirs and assigns, paying the yearly rent of fifty dollars, of lawful money aforesaid, and also doing, fulfilling, and keeping all and singular the payments, covenants and agreements hereinbefore mentioned and contained, according

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to the true intent and meaning of these presents, shall and lawfully may, from time to time, and at all times forever hereafter, fully have, use, enjoy, take and use to his and their own proper use, all manner of wharfage, crannage, advantages and emoluments growing or accruing by or from the said wharf or street, of seventy feet in breadth, called South street, fronting on the said East river, opposite to the said premises hereby granted, and every part thereof. And lastly, it is hereby covenanted and agreed upon, by and between all the said parties to these presents, and the true intent and meaning hereof also is, and it is hereby so declared, that this present grant, or any words, or any thing in the same contained, shall not be deemed, construed, or taken to be a covenant or covenants on the part and behalf of the said grantors, or their successors, but only so far as to pass the estate, rights, title, and interest they have or may lawfully claim, by virtue of their several charters."

Prior to 1810, the proprietors of water lots between Beekman slip and Peck slip, including the owners of the premises granted to the executors of Crommelin, constructed South street in front of their premises, and they were accustomed to and did collect wharfage accruing in front of their respective premises, on the outer side of this street.

Prior to 1819, there was a street or alley extending from Front street to South street, twenty-five feet wide, in public use, known as Crane-street wharf. This occupied  $12\frac{1}{2}$  feet of the premises granted to the executors of Crommelin, and the same width of the lot adjoining it on the southerly side. In 1818 the corporation, under and pursuant to the act of the legislature of 1816, (*Laws of 1816, p. 52,*) acquired title to the lands between Front and South street, and southerly of Crane-wharf street, for the purposes of a public market, known as Fulton market; the lower or river boundary of the land thus acquired for a market was a public slip. In 1819 the corporation, under and pursuant to the act of 1818, (*2 Rev. Laws, 408, §§ 177, 178,*) extended and opened Beekman street to South street. In making this extension, the corporation, pursuant to the last mentioned act, caused to be



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appraised, and took all of the said premises granted as above stated to the executors of Crommelin, except the said strip thereof forming a part of Crane-wharf street. This parcel so appraised and taken by the corporation is situate directly opposite where pier No. 23 was constructed, and the exterior lines of this parcel, if extended across South street into the East river, include the said pier and the space on which it is constructed. Beekman street, from the time it was extended as aforesaid, occupied the whole of the premises granted to the executors of Crommelin as aforesaid, and also the 12½ feet of the adjoining lot theretofore constituting a part of Crane-wharf street.

Pier No. 23 was constructed in 1821. It extended from South street and at right angles therewith from a point directly opposite Beekman street into the East river.

It appeared that the corporation, on the ninth of July, 1821, passed a resolution that said pier be built, provided the proprietors of water lots between Crane-wharf street and Peck slip (the latter being northeasterly of the former) bear and pay two-thirds part of the expense thereof; that subsequently the corporation passed another resolution declaring that it was liable to pay one-third part only of the expense of erecting the pier, and that when it should be finished the corporation would be entitled to all the wharfage and slippage on its westerly side, and the one-half of the wharfage arising on the head of the pier, according to the statute in such case made and provided; and that it was constructed pursuant to such resolutions, by the proprietors therein referred to, such proprietors paying two-thirds and the corporation one-third of the expense thereof. From the building of the pier until its extension as hereinafter mentioned, the corporation claimed and leased the wharfage arising from the westerly half of the pier, including one-half of the end thereof, but the collectors of the individual proprietors of lots collected that which arose from the easterly side and the whole of the end.

In May, 1841, the corporation passed a resolution that said pier No. 23 be extended not exceeding 72 feet, and that the extension be completed on or before the first of September then next,

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under the direction of the street commissioner; and that he take the necessary legal measures to effect the object of the resolution. In pursuance of this resolution, the street commissioner caused a notice to be duly published, dated the 23d of July, 1841, by the terms of which notice was given to the proprietors of the easterly half of said pier No. 23, that the corporation had determined that it be extended into the East river 72 feet, and that such proprietors were thereby required, on or before six weeks from the date of the notice, to signify in writing to the street commissioner their intention to join with the corporation and contribute their respective proportions of the expense of the extension, or that they would not do so; and that if any of the proprietors or persons interested should refuse or neglect to pay their proportional part of the expense of building the extension, that they would thereby forfeit all right or interest in the wharfage arising therefrom, agreeably to the act of the legislature in such case made and provided. The proprietors did not signify their intention of paying any portion of the expense of the extension, and refused to unite in building the same, and after the expiration of the time in the notice specified, the corporation caused the extension to be built at its expense, but extending the pier into the river 90 feet, instead of 72 feet as mentioned in the notice. A witness testified that this was done because it could not, by reason of obstructions, be terminated where the 72 feet terminated.

It appeared that the proprietors had knowledge of the intention and proposition of the corporation to extend the pier at their joint expense, and that the proceedings of the corporation to cause the extension to be made or make the same were contested before the common council.

The court charged the jury, that the mayor, aldermen and commonalty of the city of New-York are not, and that the defendant Guion is not the owner of the pier or wharf mentioned in the avowry and cognizance of the defendants, and that the defendants are not nor is either of them entitled to the wharfage thereof. To which decision and charge the counsel for the de-

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defendants then and there duly excepted. The jury rendered a verdict in favor of the plaintiff. The defendants moved the common pleas at a general term to set aside the verdict and order a new trial; this was refused, and judgment given against the defendants on the verdict. They appealed to this court.

*R. J. Dillon*, for appellants.

*A. H. Dana*, for respondent.

DENIO, J. The corporation of the city of New-York constructed, at its own expense, the extension of the pier No. 23, against which extension the plaintiff's vessel lay while it incurred a charge of \$20.25 for wharfage, in May, 1843. If the corporation was entitled to that wharfage, the defendant Guion, as its lessee, had a right to distrain for it; and this action, which was brought on the assumption that the distress was illegal, cannot be sustained. (2 R. L. 1813, p. 430, § 217.) In order to apply the different provisions of the statute respecting docks, slips and piers, it becomes necessary, in the first place, to settle the question as to the ownership of the ground opposite to the pier when it was originally constructed, in the year 1841 or 1842. On the 14th day of January, 1804, the mayor, aldermen and commonalty conveyed, in fee, to Daniel Seedlon, Francis Lewis and Daniel C. Verplank, described as executors of Robert Crommelin, reserving a ground rent of fifty dollars per annum, a piece of ground under water, extending from Front street to South street, and being fifty feet in breadth and about one hundred and forty-eight feet from street to street. South street was then only an imaginary space, nothing having been done towards its construction at this point; but its location was indicated by a diagram, which is referred to in the grant; and the whole of the granted premises, as well as the contemplated street, were then at the bottom of the East river. The grantees covenanted to construct South street seventy feet in breadth, directly beyond and adjoining the whole river front of the premises granted, and

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perpetually to keep it in repair; and the conveyance declared that it should remain "a public street or highway for the inhabitants of the city and all others passing or repassing through or by the same, in like manner as the other public streets of the said city now are or lawfully ought to be." The grantors covenanted that the grantees, their heirs and assigns, paying the rent aforesaid, and keeping the covenants on their part, should forever have the benefit of the wharfage and crannage, and other advantages and emoluments growing or accruing by or from the said wharf or street called South street, fronting on the East river, opposite such granted premises, as freely as the corporation had a right to grant the same. This provision respecting South street was inserted in the conveyance, to carry out the requirements of an act of the legislature of an early date, which are repeated in the revisions of 1801 and 1813. (2 *Webs. Laws*, p. 127, §§ 3, 4, 5, 6; 2 *R. L.* 1813, p. 432, § 220 and seq.) By these enactments, the corporation was authorized to lay out regular streets or wharves seventy feet wide, according to a plan which had been agreed upon, in front of those parts of the city adjoining the East river, and also adjoining the Hudson river. These streets were to be constructed by the proprietors of land "adjoining or nearest and opposite" the street or wharf, in proportion to the breadth of their respective lots, and when the nearest lots did not come down to the place where the street was located, the proprietors were to fill up the intervening spaces, and thereupon became the owners quite to the street or wharf. Should the owners of lots neglect or refuse to make the improvement, the corporation was to cause it to be done, and the expense of filling up the spaces and of constructing the streets was to be assessed upon the proprietors of the lots, and was made a lien upon such lots, which were to be sold, if necessary to raise the amount. The pier No. 23 is thirty feet wide. It springs from the easterly or river side of South street, directly opposite the lot granted to the executors of Crommelin, and runs into the river at a right angle with South street. Lines corresponding with the exterior lines of the pier, if extended across

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South street, would fall within the land embraced in that grant at its easterly boundary on South street. In March, 1816, a statute was passed reciting that the corporation had memorialized the legislature, setting forth that it was desirous of acquiring the title to a piece of ground, which is described, (and which embraces a part of the grant to Crommelin's executors,) for erecting thereon a public market, and for other public purposes, and that it was willing to defray the whole expense of the purchase out of the city treasury, upon said premises being vested in the corporation in fee simple; whereupon, provision was made for the appraisement, by commissioners to be appointed by the supreme court, of the loss and damage to the respective owners of those premises, by and in consequence of relinquishing the same to the corporation; and it was enacted that upon the confirmation of the report, the corporation should become and be seised in fee simple absolute of all the lands, tenements, hereditaments and premises in the report mentioned; and that in all cases when any lot or parcel of land "under lease or other contract," should be taken pursuant to the act, "all the covenants, agreements, conditions and engagements touching the same or any part thereof," should, upon the confirmation of the report, respectively cease and determine and be absolutely discharged. Provision was then made for the payment of the amount of the appraisal. (*Laws* 1816, p. 52.) Pursuant to this act, the corporation became the owners of the land southerly of Crane-wharf street, on the lower boundary of which was a public slip. The land was taken and appraised, and the report confirmed, December, 1818.

Under the act of 1818, (2 *R. L.* 408, §§ 177, 178,) Beekman street was extended to South street. The report was confirmed in 1819. The land taken by this extension and thus forming a part of Beekman street lies directly opposite pier No. 28, and embraced the whole of the Crommelin grant, except a strip twelve and one-half feet wide, and extending from Front to South street, lying on the east side of the Crommelin grant. That strip of land, and another piece of the same dimensions, belonging to other parties, lying still easterly of it, constituted what

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was called Crane-wharf street, which, before the opening of Beekman street, and the building of South street, ran from Front street to the East river. The portion of the Crommelin grant, which was taken and appraised, together with Crane-wharf street, was laid out into a street, and thence became an extension of Beekman street. The east end of Beekman street on South street, if extended across the last mentioned street, would more than cover the whole southerly end of the pier. Indeed, the whole of what was formerly Crane-wharf street, lies easterly of the range of the west side of the pier. Upon these facts, I am of opinion that the 224th section of the act contained in the revision of 1813, had no application to the construction of this pier. (2 *R. L.* 433; § 7 of the act of 1801.) That section, which in the order of several statutory provisions on this subject follows the directions respecting the exterior streets or wharves, provides that it shall be lawful for the corporation to direct piers to be sunk and completed, at such distances and in such manner as they in their discretion shall think proper, in front of the said streets or wharves [the exterior streets or wharves before referred to], at the expense of the proprietors of the lots *lying opposite to the places* where such piers shall be directed to be sunk. If such proprietors shall neglect to construct the piers at the time appointed by the mayor, aldermen, &c., the latter may construct them at their own expense, and in that event may take the wharfage, &c., arising from them, to their own use, or may grant it to others. Section two hundred and thirty-one provides in substance, that when there are several proprietors of lots lying opposite the place where a pier is to be sunk, and some of them refuse to join with the others in constructing the pier, the corporation may itself join with those who are willing to participate in the expense, and thereupon it shall become entitled to the proportion of wharfage which would have belonged to the delinquents if they had united in the work. The next section (§ 232) enacts, that the notice to the proprietors of lots, of the directions of the corporation for the constructing of piers, may be by an advertisement, published for six weeks in two newspapers. As the

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city itself was the proprietor of the lots opposite the place where this pier was to be constructed, the corporation had no directions to give to any private proprietors, and no publication to make respecting them. The three sections referred to had no application whatever to the state of things which existed when the corporation embarked in the enterprise of constructing pier No. 23. I have not overlooked the argument of the plaintiff's counsel, in which it is attempted to be shown that the executors of Crommelin, by constructing South street in front of their grant, acquired an ownership of the bulkhead, which entitled them, under the seventh section of the act of 1801, (corresponding with the 224th section of the act of 1813,) to construct the pier projecting from that place, and to have the emoluments arising from it. But I am not able to assent to that position, for the following reasons: (1.) Neither the act of the legislature nor the conveyance to the executors of Crommelin, contemplated any individual proprietorship of the bulkhead. It was to be and continue a public street, for the use and benefit of the whole public. The sections last referred to speak of the "proprietors of lots" lying opposite the place where piers are to be sunk, as the persons who are to pay the expense and be entitled to the wharfage of the piers. The language cannot be applied to the owners of an incorporeal right annexed to a public erection. It is in no just sense the ownership of a lot. (2.) I am of opinion that the right of wharfage, &c., secured by the grant to the executors of Crommelin, was extinguished by the act of 1813, and the proceedings under it. This right of wharfage was a servitude annexed to the estate of the owner of the land granted to the executors of Crommelin upon and over the land on which the bulkhead was built, and either passed to the corporation as the grantees of the first mentioned land, upon the same being taken for the extension of Beekman street, or was extinguished by the union of the dominant and servient estate. (*Hills v. Miller*, 3 Paige, 254; *Child v. Chappel*, *Court of Appeals*, Dec. Term, 1853.) The enactment in this respect was not constitutionally objectionable, because ample provision was made for compensation,

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not only for the land taken, but for all damages consequent upon the appropriation. (2 *R. L.* of 1813, p. 417, § 181.) It does not appear in what manner the corporation acquired the right to Crane-street wharf, whether by dedication or by purchase, or appraisement under the act of 1813. We find it relinquished to them and appropriated to public purposes, and in the absence of any evidence upon the point, the presumption would be that they had acquired it in some legal manner. If the foregoing positions are correctly stated, the corporation had a right, so far as any private proprietors were concerned, to construct pier No. 23, of their own authority; and when private rights are not interfered with, they had a general authority, as a municipal corporation, to lay out wharves and slips whenever and wherever they should deem it expedient. They had even a right to take private property for that purpose, observing the provisions respecting compensation which the law had provided. (*Montgomery Charter*, § 37; 2 *R. L.* 431, § 219.)

If the corporation had originally constructed this pier, without the concurrence of any individual proprietors, on the ground of the ownership by the city of the lot on which it abutted, I should see no objection to their extending it further into the water, if, in their judgment, such extension was required by the public good. But it was not constructed on that principle, and it therefore becomes necessary to examine some other provisions of the statute. By the 225th section of the act, (2 *R. L.* 433,) the corporation is empowered to grant to the owners of lots fronting on the exterior wharves or streets, a common interest in the piers to be sunk in front of such streets, in proportion to the breadth of their respective lots, under such restrictions and regulations, and within such limits as the corporation shall deem just and proper. This authority appears to me to apply to cases such as I have supposed this to be, where there are no private proprietors opposite to the place where the piers are to be sunk, and when the corporation might therefore construct the pier at the expense of the city and take the fruits of it, and also to cases where the private proprietors, having the right to construct the



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pier for their own benefit, had declined, after legal notice, to avail themselves of the privilege. In either of these cases, the corporation was at liberty to elect to take the enterprise wholly into the hands of the city, or propose it to the proprietors fronting on South street, within a district to be defined by the corporation. The provision is broad enough to authorize the proposition which was made to the proprietors on South street, between Crane-wharf street and Peck slip, by the resolution of July 9, 1821. That resolution and the subsequent proceedings, including the assent of the proprietors of the district above referred to, evidenced by the payment of their portion of the expense, establishes an agreement between the city authorities and these proprietors, to the effect that the latter should pay two-thirds, and the city corporation one-third of the expense of the pier, and that the proprietors should take the emoluments arising on the easterly side and one-half of the head of the pier, and the city the residue of the emoluments. The pier was constructed and paid for under this agreement; and whether the proceeding was authorized by section 225, as I have supposed, or as an enlargement of a slip under section 230, as the common council seem to have considered, or if it depended for its validity merely on the assent of the parties, it still established the legal right to wharfage, and the division thereof between the corporation and the proprietors, according to the proposition of the corporation, as thus assented by the proprietors, and came into effect by the mutual co-operation of both parties. The respective rights of the parties to the original pier being such as I have stated, it becomes necessary, in the next place, to inquire as to the effect of the extension which was made in 1841.

If the proprietors who had co-operated in the original construction of this erection, had again contributed their portion of the expense of the extension, the rights to wharfage would have been preserved as they existed in respect to the pier before its extension. This was so held, in effect, by this court, in *Thompson v. The Mayor, &c. of New-York*, (1 Kernan, 115.) But they did not so contribute. Was there then any legal manner by

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which the corporation could proceed with this enlargement *in invitam*, as upon the default of the proprietors, and construct the extension at its own expense and for its own emolument? This was clearly the view of the common council; and it was for the purpose of compelling a contribution or establishing a default of the proprietors upon which it might proceed, that the notice mentioned in the case was published. But the notice had no legal effect whatever. No provision of law contemplated a notice by advertisement to the joint proprietors of piers. Besides, this notice was for a less extensive work than the one actually constructed; (*see* 4 *Denio*, 581;) and, moreover, as has been shown, the only notice contemplated by the statute was one directed to the owners of lots lying opposite the place where a pier was to be sunk, and who had an absolute right to construct the whole work, and have all the emoluments. But actual knowledge of this intention of the corporation was brought home to the proprietors, and this appeared in the proceedings before the common council. The corporation tendered to them the right to unite in the expense, to the extent of two-thirds thereof, and to have the same rights of wharfage which they had in the original pier. This they declined, and the corporation then constructed the extension at its own expense, and it now claims to be entitled to all the emoluments arising from it. After much reflection, I have come to the conclusion that the corporation was warranted in this by the true interpretation of the provision respecting the enlarging of slips. (*Laws* 1806, p. 395, § 2; 2 *R. L.* 435, § 230.) In *The Corporation v. Scott*, (1 *Caines*, 543,) decided in 1804, the supreme court determined that the corporation could not direct the construction of a pier by the proprietors of lots opposite to its side, and reserve to itself a right to the wharfage to arise on the side of the pier adjacent to the slip formed thereby. This determination, as it is supposed, led to the passage of the provision respecting slips in the act of 1806. It declares that when the corporation shall think it for the public good, to enlarge any of the slips of the city, it shall be at liberty and have full power to do so; and

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*Marshall against Gulon.*

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upon paying one third of the expense of the necessary pier, &c., it shall be entitled to the slippage at the inner side, and one half of the wharfage at the outer end. This provision was contained in the act of 1813. I am of the opinion, in the first place, that this power was not limited to the then existing slips, but applied to all such as should exist in the city when the power came to be exercised. The object being to facilitate commerce and navigation, the exigency of the case required that the power should be a continuing one, to be exercised whenever circumstances should arise requiring its application. But the provision does not specify who shall pay the other two thirds of the expense; and in that respect it is singularly defective. It, however, evidently supposes that there may be riparian proprietors who, under prior laws, had certain rights in the emoluments of wharfage at the place where the pier is to be erected, and who would be willing to unite with the corporation upon the terms stated. But what is to be done in case they decline thus to unite? The statute is silent. Upon the plaintiff's construction, the power in that event cannot be exercised. But it is a power conferred for the public benefit, and such a construction should, if possible, be given, as to secure the public object. The language clothes the corporation in terms with full power to enlarge the slips, by constructing piers. If it had stopped there, the right would have been without qualification, except such as would arise out of the inability to take private property without compensation. If that were necessary, there would have to be an appraisal under section 219, and the compensation would have to be paid. I think the remainder of the section is intended to provide, that if the private owners will contribute two thirds of the expense of a pier, constructed with a view to enlarge a slip, such owners shall be entitled to all the emoluments arising from the wharfage, except that at the side next the slip and one half of the end; that in that event the corporation shall contribute one third of the expense, and have the emoluments arising at the places last mentioned. But I do not think the improvement can be prevented by the refusal of

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*Marshall against Guion.*

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the proprietors to unite with the corporation. In case of such refusal, I am of opinion that the work may be carried on at the expense of the city, and that when completed it will belong to the city. When a portion only of the advantage of the pier is given to the proprietors, and that only upon their defraying a portion of the expense, it would be a violent construction which should hold that they should be entitled to the prior rights, though they paid nothing and the corporation paid the whole.

As the proprietors were, before the extension, entitled to half the wharfage at the outer end of the original pier, and as that right was subverted by the extension, it may be that the right thus taken away or destroyed should have been appraised. But this case does not require us to decide that question. If there has been any invasion of the rights of the proprietors in that respect, the law provides an appropriate remedy. That remedy does not consist in vesting in the proprietors of the rights taken away, similar rights arising at another place, and which may be of very different value from those of which they have been deprived. By the agreement under which the pier was first built, the proprietors of lots became entitled by contract to wharfage at half the outer end. Whether there was an implied condition, that such right should be subject to the necessity which, in the course of years, might arise, of putting an end to the wharfage at that place by an extension, or whether it was implied that the pier should remain forever as it was then built, is a question not necessarily involved in this case. Whichever way it may be decided, the proprietors cannot make title to any part of the extended pier, or to any right of wharfage arising upon it. The plaintiff, a ship-owner, caused his vessel to be fastened to the extended pier, and thus became liable to pay wharfage. He may show, to avoid the defendant's claim to distrain, that the pier belonged to another, under whom the defendant has no title, but he cannot be permitted to allege that other parties were injured by the erection of a pier, unless he will go farther and maintain that the consequence of such injury was to confer on

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*Belknap against Waters.*

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the injured party an actual title to the structure, by the erection of which the injury was inflicted. This he cannot do, and he cannot therefore resist this distress.

The judgment should be reversed and a new trial ordered.

Judgment accordingly.

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*BELKNAP against WATERS.*

This court has jurisdiction to review an order made by the supreme court, vacating a judgment entered by confession, on account of a defect in the statement. Accordingly, where a judgment was entered by confession, and the supreme court, on the application of another creditor of the judgment debtor, made an order, at special term, vacating the judgment, which order was affirmed at general term, and the plaintiff in the judgment appealed to this court; *Held*, that the appeal would lie.

**MOTION** to dismiss appeal. On the 28th of June, 1852, a judgment for \$2873.52 was entered in the supreme court in favor of *Belknap against Waters*, upon confession, without action. One Carpenter, who had a chattel mortgage upon personal property of Waters, and also a judgment against him in the supreme court, moved that court to set aside the judgment of Belknap, upon the ground of insufficiency in the statement on which the judgment was entered. Belknap made at the same time a cross motion, that the statement might be amended without prejudice. The supreme court, at special term, March 6, 1854, ordered the judgment of Belknap to be set aside, but allowed Belknap to file a new and amended statement, the judgment to take effect from the time of filing the same only, and not to affect the rights of other creditors of Waters then acquired. From this order Belknap appealed to the general term, where it was affirmed. Belknap appealed from that order to this court.

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*Belknap against Waters.*

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*T. McKissock*, for motion.

*N. Hill, Jr.*, opposed.

JOHNSON, J. The code of procedure, § 1, declares that remedies in the courts of justice are divided into, 1. Actions; 2. Special proceedings. Sec. 2 declares that "an action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Sec. 3 says that "every other remedy is a special proceeding."

The application made by Carpenter to the supreme court was not an action, because although it might be difficult to affirm that it is not an ordinary proceeding in a court of justice, yet looking at all the provisions of the code touching civil actions, it appears that by "ordinary proceedings" it was intended to designate those ordinary proceedings which are instituted by summons and complaint when they are of a civil nature. If, therefore, his application was a remedy at all, it was a special proceeding. The code unfortunately has not furnished us a definition of a remedy, except in so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or order as a remedy. If this be so, then Carpenter's application, which was an original proceeding instituted by him claiming redress, was a special proceeding. He was no party to the judgment which he asked to have set aside, and his application cannot therefore be said to be in a suit or action.

The 3d subdivision of section 11 of the code gives this court power to review upon appeal every actual determination made by the supreme court at general term, in a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.

The order of the supreme court at general term in this case, affirming that at special term, gave to Carpenter the complete re-

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Belknap *against* Waters.

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lief for which his application was made. It set aside and vacated the judgment of which he complained. It was therefore not only a final order, but it clearly affected a substantial right of the appellant. The appeal comes therefore within the provision in question, and we are bound to entertain it.

We were referred, upon the argument, to two cases in this court which were supposed to decide adversely to the appellant's right to appeal. (*Sherman v. Felt*, 2 *Comst.* 186; 3 *How. P. R.* 425; *Dunlop v. Edwards*, 3 *Comst.* 341.) In the first, it was held that, upon a motion by a party to set aside a judgment in the supreme court either for irregularity or as a matter of favor, the decision of that court was either upon a matter of practice, or a question of discretion, and that from such a decision no appeal would lie. In that case, also, the latter clause of the 3d subdivision of § 11 received a construction, and it was held that the words, "a final order affecting a substantial right, made upon a summary application in an action after judgment," related only to summary applications which assumed the validity of the judgment, or were based upon its existence. In the other case the order appealed from was made upon an application by the defendant, in a judgment on confession, to set it aside upon the ground that the bond and warrant of attorney on which it had been entered had been executed by him as surety for the payment of an award to be made between third parties, and that the submission had been subsequently altered without his consent or knowledge, before the judgment was entered. The judgment had been entered in June, 1847. In December, 1848, the motion at special term was made and denied, and the decision was affirmed at general term. The case seems to have been presented to the court only in the aspect of a summary proceeding in an action after judgment. Regarding it in that way, the court dismissed the appeal, holding that the motion was not a future proceeding in a pending suit within the meaning of the act supplemental to the code, [ch. 380 of the laws of 1848,] the judgment having been perfected in 1849. The other positions affirmed by the court in

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*Zabriskie against Smith.*

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that case related to the appeals given by the supplemental act, and by sec. 457 of the code of 1849, neither of which are involved in the case now before the court.

Motion denied.

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**ZABRISKIE, respondent, *against* SMITH, appellant.**

Since the enactment of the code of procedure it is not requisite, in order to review questions of law arising upon the trial, that the exceptions taken should be signed or sealed by the justice before whom the trial was had, or that a bill of exceptions be made.

Where, on an appeal to this court, it appears by the return that the exceptions were taken at the trial and separately stated, it is not necessary that they should be authenticated by the justice who tried the cause, or the court below.

But where the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising upon them, the party desiring a review in this court should procure the exceptions to be separated from the case by or under the direction of the court below, or a justice thereof. *Per* JOHNSON, J.

If it does not appear from the return either that the exceptions were in the first instance stated separately, or that they were separated from the case in which they were originally stated under the direction of the court below or a judge thereof, the appeal to this court will be dismissed. *Per* JOHNSON, J.

MOTION on behalf of respondent to dismiss the appeal, on the ground that the record did not contain a bill of exceptions, or exceptions separated from the case; that it contained merely exceptions stated in a case.

*N. Hill, Jr.*, for the motion.

*B. Davis Noxon*, opposed.

JOHNSON, J. A motion has been made to dismiss the appeal in this cause, the decision of which turns upon the question



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*Zabriskie against Smith.*

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whether the judgment roll in the action presents any question which can be reviewed in this court.

The cause was tried in June, 1853, and resulted in a verdict for the plaintiff. The defendant took exceptions at the trial, which were ordered by the judge who presided at the trial to be heard in the first instance at general term. At the general term judgment was rendered for the plaintiff, and from this judgment the defendant has appealed. The judgment roll contains a paper entitled "case containing exceptions made by the defendant," from an examination of which it appears that at the end of the plaintiff's evidence the defendant moved for a nonsuit, and excepted to the judge's decision denying that motion, and also that at the close of the evidence the defendant made several requests to the judge to charge the jury in a specific way, and excepted to the judge's ruling upon those requests, or some of them.

The 265th section of the code provides, in respect to jury trials, that when exceptions are taken, the judge trying the cause may at the trial direct them to be heard in the first instance at a general term, the judgment to be in the mean time suspended, and that in such cases the exceptions are to be heard at general term and judgment there given. The proceedings below seem to have been in exact accordance with the provisions of the code above mentioned, and, so far as the judgment is concerned, the case is regularly brought before us.

The code, section 264, provides further in respect to jury trials as follows: "If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of the court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court or a judge thereof." The provisions of this section absolutely dispense

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*Zabriskie against Smith.*

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with signing and sealing exceptions, and as plainly declare that a bill of exceptions need not be made.

Under the former practice if a paper containing exceptions, and the evidence and rulings of the court upon which the exceptions were founded, was upon the trial signed and sealed by the judge below, it was always regarded in the appellate courts as a bill of exceptions, although it lacked the formal commencement and conclusion technically appropriate to a bill of exceptions. It resulted from the nature of a bill of exceptions under the old practice, that no appellate court undertook to exclude any matters from the bill which the judge who signed it had thought proper to be inserted, even though many things contained in it might seem to the appellate court irrelevant to the questions of law presented. The bill was a history of the trial sufficiently full to present the points of law excepted to, with the evidence on which the points raised arose, certified by the signature and seal of the judge. The appellate courts of course disregarded all matters which were actually contained in the bill which did not relate to questions of law decided, and in theory the bill should never have contained any other matters. This position in respect to the proper mode of framing bills of exceptions was often reiterated by the appellate courts; but still, if the judge who settled the bill chose to insert in it matters irrelevant, there were no means by which the appellate court could interfere to correct the abuse. The same practice governed the courts in respect to cases made, with liberty reserved to turn them into bills of exceptions. The process of conversion was entirely under the control of the court below, and indeed all such cases came before the appellate courts in the form of bills of exceptions, and nothing would regularly appear upon the record to show that the bill had not been taken at the trial, or that a case had ever been made.

The new provision in § 264 as amended, confers upon us no new authority in respect to the form which a statement of exceptions shall take. It is true that the statute says they are to be separated from the case, if they were originally contained in a

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*Zabriskie against Smith.*

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case, whenever such a separation is necessary, and that such a separation would seem to be necessary upon an appeal to a court which can only regard the legal questions presented; but still the question whether they are capable of being separated is a matter to be determined in the court below, if any where. If, in the first instance, the exceptions are stated in writing separately, according to the code, nothing in the statute in terms requires their authentication by the judge who tried the cause, or by the court below. We therefore are not authorized to require any such authentication in respect to them. If the exceptions are in the first instance stated in a case, an appeal to this court, which can only consider the legal questions presented, renders a separation necessary, if any legal proceeding can. There may undoubtedly be cases in which the same matters ought to appear, whether the object be to move the court below as upon a case, or as upon a bill of exceptions. In such cases, of course no separation would be possible, because by the supposition all the matters contained are material in either aspect. In all cases where matters are contained in a case containing exceptions, which are not necessary to present the legal questions arising upon the exceptions, a separation should take place, so that upon the appeal to this court the questions of law may be presented unincumbered by irrelevant matter. That this is the only correct course of practice, is plain. The precise question in this case is, whether we can enforce a compliance with these provisions of the statute, by dismissing the party's appeal. Unless we possess this power, the provision of the statute cannot be enforced. The successful party in the court below cannot be required to apply there to have the exceptions separated from the case, because, until an appeal is perfected, the necessity for a separation does not appear, and the duty of procuring the separation to be made falls upon the party who wishes to avail himself of the exceptions upon the appeal. Nor can we effectually carry out the statute, by refusing to hear the cause until such separation has been made. That course would suspend the cause indefinitely, and in cases where the appeal was brought for delay,

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*Zabriskie against Smith.*

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would operate to punish the party who is not in fault. We must therefore possess the power of dismissing the appeal, in order to make the provision in question effectual for the purpose which it was intended to answer.

In those cases, therefore, where the return to this court does not show that the exceptions were stated separately according to the statute and not in a case, we must require that they shall appear upon the return to have been separated from the case under the direction of the court below, or of a judge thereof, or that the court below or a judge thereof has determined that in the particular case no separation was possible. As the practice under this provision of the code is new, and has not heretofore been settled, leave will be granted to appellants to procure a proper settlement or amendment in the courts below within some limited time, on pain of dismissal, unless they avail themselves of such leave. In the case in which this motion is made, it does appear that the exceptions were taken at the trial and directed to be heard in the first instance at general term. This proceeding is applicable only to exceptions stated separately and not in a case, and it therefore sufficiently appears in this case that the return is in proper form, and the motion to dismiss must be denied.

Motion denied.

END OF CASES DECIDED AT SEPTEMBER TERM.

*Notes.* RUGGLES, J., was prevented by sickness from hearing the cases argued which were decided at the September term, and therefore took no part in their decision.

CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW-YORK,  
DECEMBER TERM, 1854.

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**DORR and others *against* THE NEW JERSEY STEAM NAVI-  
GATION COMPANY.**

Where there is no special contract as to the liability of a common carrier of property, he is responsible for all loss or damage except that which is caused by the act of God or the public enemy.

He cannot limit this liability by notice, even if it be brought to the knowledge of the owner.

But common carriers may limit their liability by an express agreement with the owner.

ACTION commenced in the supreme court, prior to July, 1848. The declaration averred that the defendant was a common carrier of merchandise for hire, between the city of New-York and Stonington in the state of Connecticut, and that the plaintiffs, at the former place, delivered to the defendant as such carrier, and the latter as such received from them two cases of merchandise of the value of \$3500, to be safely carried by the defendant to and

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*Dorr against New Jersey Steam Navigation Company.*

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delivered at Stonington, for a reasonable reward to be paid therefor; yet that the defendant did not safely carry the merchandise and deliver the same at Stonington, but so carelessly and negligently conducted itself, that by and through the negligence and misconduct of the defendant the said merchandise became and was lost to the plaintiffs. The defendant pleaded, (1) the general issue; (2) that the merchandise was delivered by the plaintiffs to and received by the defendant on board the steamboat Lexington, under and in pursuance of a special contract made between the plaintiffs and defendant, for the transportation of the same from New-York to Stonington, in the following words, viz :

"New Jersey Steam Navigation Company, received of S. & F. Dorr & Co., on board the steamer Lexington, Child, master, two cases for E. Baker & Co., Boston, marked and numbered as in the margin, to be transported to Stonington, and there be delivered to railroad agent or assigns; danger of fire, water, breakage, leakage and all other accidents excepted; and no package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars.

Freight as customary with steamers on this line.

N. B. The company are to be held responsible for ordinary care and diligence only in the transportation of merchandise and other property shipped or put on board the boat of this line.

Dated at New-York, January 13th, 1840.

Contents unknown.

GEORGE CHILD, master."

That while the merchandise was well and properly stowed on board the steamboat and being carried pursuant to the contract, and without any carelessness or misconduct of the defendant or its servants, or any defect in the boat or its equipments, the boat, by mere casualty and accident, took fire and was consumed, with its cargo, including the merchandise of the plaintiffs; and thereby, by accident and casualty of fire, and not by any negligence, misconduct or default of the defendant, the merchandise was not delivered at Stonington, and became lost to the plaintiffs. The plaintiffs demurred to the second plea, and there was joinder.

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*Dorr against New Jersey Steam Navigation Company.*

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The demurrer was heard in the superior court of the city of New-York, and judgment ordered thereon for the plaintiffs. (*See 4 Sandf.* 136.)

Afterwards the issue of fact was tried before Edwards, J. The plaintiffs proved that the defendant was a common carrier, as stated in the declaration, and that the two cases of merchandise were delivered by the plaintiffs to the defendant at New-York, on board the Lexington, to be transported and delivered as in the declaration averred; that the merchandise was not delivered at Stonington, but was lost between there and New-York while in the custody of the defendant, and that its value was \$1765. The defendant proved that the goods were received from the carman of the plaintiffs, and the receipt or bill of lading set out in the second plea given him therefor by the master of the boat; that this receipt was the usual printed form of bill of lading then and during several years previous used by the defendant in its business as a carrier, and that the plaintiffs were and during many years had been merchants in New-York. The plaintiffs in reply further proved that the fire by which the steamboat and its lading were consumed, was not occasioned by the act of God or the public enemy, and that the said receipt or bill of lading did not come to the knowledge or possession of the plaintiffs, otherwise than by the delivery of it to the carman, until the day after the goods were shipped. The counsel for the defendant requested the court to charge the jury, (1) that the defendant was not liable, if the loss of the goods was occasioned by a cause excepted from the defendant's risk by the receipt or bill of lading; (2) that the defendant's liability did not exceed the amount of two hundred dollars for each package mentioned in the receipt or bill of lading, with interest thereon from the time of the loss. The court refused to charge in conformity with either of said requests, and charged the jury that the loss having occurred while the goods were in the defendant's possession as a common carrier, and not by the act of God or the public enemy, the defendant was responsible; and that the liability of the defendant was not restricted to the sum of two

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Dorr *against* New-Jersey Steam Navigation Company.

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hundred dollars a package named in the bill of lading, but extended to the actual value of the goods. To which refusals to charge as requested, and to the charge as given, the defendant duly excepted. The jury returned a verdict in favor of the plaintiffs for \$3247.90. The defendant moved the supreme court, sitting in the first district, for a new trial, on a bill of exceptions, which was refused, and judgment perfected in favor of the plaintiffs. The defendant appealed to this court.

*Wm. M. Evarts*, for the appellant, insisted, I. The judgment on the demurrer to the special plea should have been for the defendant. Neither public nor private necessity or convenience requires that common carriers, on the one hand, should be compelled to be insurers against fire, unless the bailor insists upon it; nor that the bailor, on the other hand, should be obliged to pay rates of carriage which include compensation for insurance, unless he choose so to do. To legally incapacitate the parties from separating, by mutual contract, the service of transportation and the responsibility of insurance, involves this absurdity. (*Orange Co. Bank v. Brown*, 9 *Wend.* 85; *Hollister v. Newlen*, 19 *id.* 284; *Cole v. Goodwin*, *id.* 251; *Wells v. The St. Nav. Co.*, 2 *Comst.* 204; *Parsons v. Monteath*, 13 *Barb.* 353; *Moore v. Evans*, 14 *id.* 524; *Stoddard v. L. Is. R. R. Co.*, 5 *Sand. S. C. R.* 180; *Dorr v. N. J. St. Nav. Co.*, 4 *id.* 136, (*case at bar*); *N. J. St. Nav. Co. v. Merch. Bank*, 6 *How.* 844.) The only case in any book to the contrary is *Gould v. Hill*, (2 *Hill*, 623,) since overruled by two later cases in the same court, *ut supra*.

II. The refusal to charge in conformity with the first request of the defendant's counsel, and the actual charge upon the point, are open to exception for error upon the same grounds as is the judgment on the demurrer. The proof at the trial fully sustained the matter of the special plea, and so presented the same questions of law.

III. The exception to the refusal to charge in conformity with the second request of the defendant's counsel, and to the actual



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charge upon the point, was well taken. 1. The limitation of value per package for which the carrier should be liable, is a perfectly valid stipulation in the contract. The reward of the carrier is accommodated to this rate of value, and the bailor, receiving thus the benefit of the limitation, cannot repudiate it. 2. As a mere *valuation*, to preclude fraud or dispute, as in valid policies of insurance, the limitation is valid and will be upheld. 3. The controversy respecting the right of a carrier by special contract to restrict his common law liability, has never brought in question the validity of such limitations of value. (*Cole v. Goodwin*, 19 *Wend.* 251, and other cases above cited.)

*B. D. Silliman*, for the respondents. I. The rule is settled in this state, that a common carrier cannot by notice shelter himself from his common law liability, even though such notice be distinctly brought home to the bailor. (*Hollister v. Nowlen*, 19 *Wend.* 234; *Cole v. Goodwin*, *Id.* 251; 21 *id.* 354, 153; 3 *Hill*, 9; 7 *id.* 533; 26 *Wend.* 594; 2 *Ken's Com.* 608.)

II. In the present mode of transportation by common carriers, public policy imperatively requires strict adherence to the common law rule of liability; and that carriers' notices inserted in receipts given and received, where property is delivered at railroads and steamboats, should not be treated as mutual and deliberate contracts waiving liability. (*Doctor and Student*, 270, *Dial. C.* 38; *Attwood v. Reliance Trans. Co.*, 9 *Watts' R.* 87; *Stanton v. Allen*, 5 *Denio*, 434; *Hooker v. Vandewater*, 4 *id.* 349; *Per Ld. Kenyon*, in *Hyde v. Trent. Co.*, 1 *Esp. N. P. C.* 35; *Per Bronson, J.* in *Hollister v. Nowlen*, 19 *Wend.* 239; *Bell v. Leggett*, 3 *Selden*, 176.) The evils which resulted in England by departing from the common law rule were so great, that the courts expressed strong regret that the innovation had been tolerated. (*Bell's Comm.* 1, 474; *Maving v. Tod*, 1 *Starkie*, 79; *Smith v. Horrie*, 8 *Taunt.* 144; *Down v. Fromont*, 4 *Camp.* 40; *Duff v. Budd*, 3 *Brod. & Bing.* 177.) In some of the United States such notices have been admitted, (*Jones v. Voorhees*, 10 *Ohio*, 145,) and the same regrets have

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Dorr *against* New Jersey Steam Navigation Company.

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been expressed by the courts. (*Eagle v. White*, 6 *Wharton*, 516; *Barvey v. Prentiss*, 4 *Harr. & John*. 317.)

III. Admitting, for sake of the argument, that the carrier can protect himself by special mutual contract from his common law liability, still the bill of lading set forth in the plea is not such a contract. It is at most a receipt for the goods, with notice incorporated therein that the carrier denies the liability which the law imposes on him. It is at most notice brought home to the bailor, and is no higher evidence of the contract than were the notices of stage proprietors brought home to the knowledge of their passengers. (*Down v. Fromont*, 4 *Camp*. 40; *Nicholson v. Willan*, 5 *East*, 507, n.; *Beckman v. Shouse*, 5 *Rawle*, 179; *Clarke v. Gray*, 6 *East*, 564; *Jones v. Voorhees*, 10 *Ohio*, 150; *Cole v. Goodwin*, 19 *Wend.* 280; *Gould v. Hill*, 2 *Hill*, 628.)

IV. The supreme court, in a case like that before the court, held, that the insertion in the bill of lading of a clause to the same effect with that under consideration, would not discharge the carrier. (*Gould v. Hill*, 2 *Hill*, 628.) This decision has been incidentally approved by the court for the correction of errors. (*Alexander v. Greene*, 7 *Hill*, 562; *Powell v. Myers*, 26 *Wend.* 594.)

PARKER, J., delivered the opinion of the court.

The courts of this state have steadily adhered to the common law rule, that a common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Since the very full and learned discussion of that question in *Hollister v. Nowlen*, (19 *Wend.* 284,) and *Cole v. Goodwin*, (*Id.* 251,) it has been regarded as settled upon mature deliberation, and the conclusion arrived at in those cases has been uniformly acquiesced in and followed. (*Camden Co. v. Belknap*, 21 *Wend.* 354; *Clark v. Faxton*, *Id.* 153; *Alexander v. Greene*, 3 *Hill*, 9; 7 *id.* 533; *Powell v. Myers*, 26 *Wend.* 594.) These decisions rest on the very satisfactory reasons, that the notice was no evidence of assent on the part of the owner, and that he had a right to repose

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Dorr *against* New Jersey Steam Navigation Company.

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upon the common law liability of the carrier, who could not relieve himself from such liability by any mere act of his own.

But the question here presented is of a very different character. It is, whether it is competent for the carrier and the owner, by an agreement between themselves, to establish conditions of liability, different from those cast by law upon a common carrier. I think this question is distinctly presented by the demurrer to the second plea; and it seems to me also to be involved in the decisions made at the trial of the issue of fact; for the exceptions to the common law liability, being made in the bill of lading and delivered to the agent of the plaintiffs, must be deemed to have been agreed upon by the parties. If such is not the legal inference, then it was a question of fact for the jury to decide what was the agreement between the parties, and in that case the same question of law would still be presented for decision.

The plaintiffs rely upon the case of *Gould v. Hill*, (2 *Hill*, 623.) It was there broadly decided by a majority of the late supreme court, Ch. J. Nelson dissenting, that common carriers could not limit their liability, or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported. That decision rested upon no earlier adjudication in this state, though the question had been previously discussed and *obiter* opinions upon it sometimes expressed by judges, in deciding the question whether a carrier could lessen the extent of his liability, by notice. But the case of *Gould v. Hill* has been deliberately overruled by the present supreme court, in two carefully considered cases, viz: *Parsons v. Monteath*, (13 *Barb.* 353;) and *Moore v. Evans*, (14 *id.* 524.) In both those cases the question is examined with much ability, and I think the unsoundness of the conclusion in *Gould v. Hill* most satisfactorily shown. I am not aware that *Gould v. Hill* has been followed in any reported case. In *Wells v. The Steam Navigation Company*, (2 *Comst.* 209,) Bronson, J., who seems to have concurred with Judge Cowen in deciding *Gould v. Hill*, speaks of the question as being still, perhaps, a debatable one.

*Dorr against New Jersey Steam Navigation Company.*

That a carrier may, by express contract, restrict his common law liability, is now, I think, a well established rule of law. It is so understood in England; (*Alleyn*, 93; 1 *Vent.* 190, 238; *Peake's N. P. C.* 150; 4 *Burr.* 2301; 1 *Starkie's R.* 186; 2 *Taunt.* 271; 8 *Mees. & Welsby*, 443; 4 *Co.* 84;) and in Pennsylvania, (16 *Penn. R.* 67; 5 *Rawle*, 179; 6 *Watts & Serg.* 495.) In other states, where the question has arisen whether notice would excuse the liability of the carrier, it seems to have been taken for granted that a special acceptance would do so; and in *N. J. Steam Nav. Co. v. Merchants' Bank*, (6 *How.* 382,) it was so held by the supreme court of the United States. For the concurrent opinions of elementary writers in favor of this doctrine, see *Story on Bail.* § 549; *Chitty on Cont.* 152; 2 *Kent, Com.* 606; *Angell on Carriers*, §§ 59, 220, 221. Upon principle, it seems to me no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests. No one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier. If the owner chooses to relieve him and assume the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of compensation, and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation cannot, without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so.

It is true a common carrier exercises a quasi public employment, and has public duties to perform; that he cannot reject a customer at pleasure, or charge any price that he chooses to

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Dorr *against* New Jersey Steam Navigation Company.

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demand; and that if he refuses to carry goods according to the course of his employment, without a sufficient excuse, he will be liable to an action; and that he can only demand a reasonable compensation for his risk and services; (*Bac. Abr. Carriers*, [B.]; 2 *Kent*, 599; *Story on Bail*. 328; 2 *Ld. Raymond*, 917; *Skin*. 279; 1 *Sulk*. 249; 2 *Show. R.* 332; 8 *Mees. & Wels.* 372; 1 *Pick.* 50; 15 *Conn. R.* 539;) and that an action will lie against him upon a tort, arising *ex delicto*, for a breach of duty. (*Orange Co. Bank v. Brown*, 3 *Wend.* 158.) In such case, there being no special contract, the parties are supposed to have acted with a full knowledge of their legal rights and liabilities, and there may be, perhaps, good reason for the stringent rule of law, which makes the carrier an insurer against all except the act of God and the public enemy. But when a special contract is made their relations are changed, and the carrier becomes, as to that transaction, an ordinary bailee and private carrier for hire. This neither changes nor interferes with any established rule of law; it only makes a case to be governed by a different rule. To say the parties have not a right to make their own contract and to limit the precise extent of their own respective risks and liabilities, in a matter in no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.

The judgment of the supreme court should be reversed and judgment be given for the defendant on the demurrer, with leave to the plaintiffs to reply on terms, and a new trial should be awarded on the issue of fact.

Judgment accordingly.

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*Pugsley against Aikin.*

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*PUGSLEY against AIKIN and another, executors.*

Where premises are leased "for the term of one year and an indefinite period thereafter," at an annual rent which the lessee agrees to pay, and he enters and occupies several years, he is the owner of an estate as tenant from year to year, arising out of the original demise.

On the death of the tenant this estate passes to his personal representatives, and they hold it by virtue of the demise to him. And where the executors of the tenant omitted to terminate the tenancy and continued to occupy the premises from year to year; *Held*, that they were liable in their representative capacity for the rent accruing during such occupancy by them; and that a demand for this rent was properly united with a demand for rent accruing during the lifetime of the tenant, in a suit against the executors.

**DEMURRER** to complaint. The action was brought against the defendants as executors of William Aikin, deceased. The complaint alleged that on the first of April, 1838, Gerard Morris and Henry Morris were owners, as tenants in common with others, of a farm, said Gerard and Henry each being the owner of one-twentieth of the premises; that on the day last named, William Aikin hired and rented the farm of the owners "for the term of one year and an indefinite period thereafter," at an annual rent of four hundred dollars, and agreed to pay said Gerard and Henry, respectively, twenty dollars per year, as rent for their respective shares in the premises; and that, by virtue of this agreement, William Aikin took possession of and occupied the farm as tenant from year to year, until his death in April, 1841. That on the death of William Aikin, the defendants were appointed executors of his will, and as such executors took possession of and occupied and enjoyed the farm and the shares of said Gerard and Henry as like tenants from year to year, at the rent aforesaid, until May, 1850. That neither the testator in his lifetime, or the defendants as his executors, had given notice terminating the tenancy, and that the rent from and including that for the year ending the first of April, 1840, was unpaid. The complaint alleged further, that the said Gerard

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*Pugley against Aikin.*

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and Henry had sold and transferred to the plaintiff the rent so due and owing to them respectively, and their claim to the same, and demanded judgment for \$40 and interest from the first day of April, 1840, and a like sum with interest thereon for each succeeding year, to and including the year ending on the first day of April, 1850.

The defendants demurred to the complaint, assigning as grounds of demurrer, 1. That distinct causes of action have been improperly joined in the said complaint; inasmuch as the alleged cause of action for rent, claimed to have accrued on a contract made by the said William Aikin in his lifetime, is improperly joined with a claim for rent, claimed to have accrued upon a contract with the said defendants since his death; 2. That the facts set forth in the said complaint constitute no cause of action against the defendants.

The cause was heard at a special term of the supreme court held by Justice Pratt, and judgment ordered in favor of the plaintiff. This judgment was reversed by the supreme court sitting in the third district at a general term, and judgment ordered in favor of the defendants on the demurrer. (*See 14 Barb. 114.*) The plaintiff appealed to this court.

*Wm. Barnes*, for the appellant.

*John H. Reynolds*, for the respondents.

GARDINER, Ch. J. I do not perceive that distinct causes of action are united in this complaint, as the defendants have alleged, and the supreme court have determined. The tenancy created by the original contract between the defendant's testator and those represented by the plaintiff was to continue until the parties to it, one or both, elected to terminate the demise, by giving the half year's notice prescribed by law. If, after the close of the first year, the lessee rightfully remained in possession, it was not by virtue of a new demise, but by force of the old one. That he continued, under a contract for the pos-

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Pugsley *against* Aikin.

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session of some kind, must be and is admitted ; otherwise, the occupation would be tortious, and the tenant holding over could have been ousted at any time at the election of the landlord. No such right upon the part of the lessor is pretended. The supposition of a new agreement, made at the commencement of the second year, for a continuance of the tenancy, is not only untrue in fact, but in this case conflicts with the allegations of the complaint which are admitted by the demurrer. The plaintiff there avers "that the testator hired and rented the farm for the term of one year, and an indefinite period thereafter." There was therefore but one contract, and we are not at liberty to suppose another. For although the law will sometimes tolerate a fiction, it is always in aid of, and never to the prejudice of the right of a party. In *Legg v. Strudwick*, (2 Salk. 414.) it was adjudged in reference to a lease of this description, "that it was a lease for a year certain, and that every year after, it was a springing interest arising upon the *first contract*, and *parcel of it* ; and that the lessor might avow as for rent due upon an entire lease, and not for a several rent, due upon several leases, accounting each year a new lease." In a note in *Bacon's Abridgment*, (*Lease*, L. p. 626,) it is said, "that notwithstanding the puzzle in the books respecting these running leases, the law is now considered settled agreeably to the case of *Legg v. Strudwick*. They are leases for one, two and more years certain, according to the form of the lease, depending for their further continuance upon the will of the parties. And that such will be their will, the law presumes, unless the contrary be evidenced by a regular half year's notice, that the tenant continuing in possession is not a tenant at will, but a tenant for years."

The doctrine of these authorities, when analyzed, amounts to this ; that when a tenancy from year to year is created by the agreement of the parties, it continues until terminated by a legal notice. The estate does not depend upon a continuance of possession ; for the tenant cannot put an end to the tenancy, or his liability for rent, by withdrawing from the occupancy of the premises. The notice is a condition of the contract, in the lan-



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*Pugley against Alkin.*

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guage of these authorities, arising out of it, which must be complied with, in order to absolve him from further responsibility.

If this view is correct, there is no misjoinder of distinct causes of action in the case before us. The testator had manifested his election, that the lease should not terminate during the year succeeding his death; and was, as we have seen, liable for the rent of the year 1842. After his decease, in April, his executors, as such, entered into possession. They were under no obligation to put an end to an interest which the decedent had deemed beneficial, and which they as his representatives thought advantageous to his estate. They would have violated a plain duty, as trustees of the property, by relinquishing by their own act a valuable lease, without any equivalent. They therefore continued, as the representatives of the testator, to occupy the lands during the period in which the rent accrued for which this action is brought. This is distinctly averred in the complaint. And having as trustees and executors rightfully received the profits of the demised premises, they are liable in that character to the payment of the rent.

The second cause of demurrer, viz., that the complaint did not state a cause of action, is consequently untenable. The current year, according to the terms of the lease stated in the complaint, would expire on the first of April. To terminate the tenancy the lessee must have given, six months previously, notice of his intention to do so, or the lease would continue another year. The testator died in the month of April, 1841, without having given any notice whatever, and of course his liability for the rent of that year had its inception, in any view of the case, in the lifetime of the lessee, and when that time expired, became a debt properly chargeable against his estate. The supreme court accordingly placed their decision upon the first cause of demurrer, which is obviously the only one deserving consideration.

The judgment of the supreme court at general term must be reversed, and that of the special term affirmed.

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Pugaley against Aikin.

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W. F. ALLEN, J. The demise to the defendant's testator, as set out in the complaint, is for one year from the first day of April, 1848, and an indefinite period thereafter, with an averment of the occupation of the demised premises by the testator during his life, and by the defendants as executors from that time up to the first day of May, 1850. Under this allegation, the interest of the lessee at the time of his death was that of a tenant from year to year, and the estate could not be determined except by a notice of six months, terminating with the year, from one of the parties to the other, of an intention to determine the same. As often as the half year's previous notice was omitted to be given, the term became an assured term for a new year from the expiration of the current year. (*Burton on Real Property*, 277.) Had the lessee lived and continued to enjoy the premises under this demise, the several years of his occupation would have been treated as an entire term under one lease, and not as a holding under several annual lettings. (*Bac. Abr. Lease*, L. 8; *Birch v. Wright*, 1 T. R. 380.) Such is the legal effect of the contract set out, to wit, that the lessee should occupy the premises at a given annual rent until one or the other party should, by the prescribed notice, terminate the contract and put an end to the term. (*Doe v. Porter*, 8 T. R. 18.) The whole occupancy was but one term and under one lease.

The estate of the lessee was an estate for years and a chattel real, which went to and vested in his executors as a part of his personal estate. (1 R. S. 722, §§ 1, 5; 2 *id.* 82, § 6; *Burton on Real Property*, 277.) The executors became seised of the same estate and interest in the lands which their testator had, and no other. No change was wrought in the estate or the term by the death of the testator, and the casting of it upon the executors. The precise interest in the lands demised, which the testator had at the time of his death, became assets in the hands of his executors, and they held it as executors and not in their own right, and it came to them charged with the same burthen with which it was charged in the hands of the testator, and that

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Pugsley against Aikin.

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burthen, which was the rent reserved, was chargeable upon the estate of the deceased, and not upon the executors in their own right. Coming to the enjoyment of the premises in their representative character, they could not legally divest themselves of that character and retain the possession for their own benefit. A renewal of the lease, had such a thing taken place, from year to year by contract, express or implied, would have enured to the benefit of the estate upon the familiar principle which forbids a person assuming to act as trustee to act in the same matter for his own benefit. In the case at bar, the averment, which is admitted to be true, is, that the defendants as executors took possession of and used, occupied, enjoyed and sub-let the said farm, &c. It is not denied that if the occupation was in pursuance of and under the contract made by the testator, the estate is chargeable with the rent, and the action is properly brought against the executors to charge them *de bonis testatoris*; and the case made by the complaint is of a hiring by the testator, until such time as one or the other party to the contract should by notice terminate the same, and which has never been terminated. It follows from this statement, in connection with the admitted occupancy by the defendants as executors, that the estate is properly chargeable upon the contract of hiring by the deceased. In *Mackay v. Mackreth*, (4 *Douglas*, 213,) where A. made a lease to B., his executors, &c., for one year, and so from year to year so long as it should please the said A. and B., his executors, &c., it was held that the term did not expire with the death of B., but vested in his executors. It is true Lord Mansfield rests his decision upon the words of the demise as alleged, and says, "If it had been a lease from year to year, it would have expired at the end of the year after the death of the tenant, without notice, but the present demise continues till the executor determines it by notice." But so far as the terms of the demise go, they are not essentially different from the case before us, and the decision would be an authority in favor of the plaintiff. But the subsequent cases tend very clearly to show

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*Pugsley against Aikin.*

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that the legal effect of a lease from year to year is the same as that given to the demise referred to. In *Doe v. Porter*, (8 T. R. 13,) it was decided that in the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, the administrator has the same interest in the land which his intestate had; and the lessee of such an administrator may declare in ejectment on a term for seven years. Lord Kenyon says, "As between the original parties, as long as both of them lived, he (the lessee) could not have been dispossessed without six months' notice, ending at the expiration of the year. But it is argued that though this was the interest which Wm. Shore had, a different interest devolved on his personal representatives. On this question I do not know how to state a doubt, for this was a chattel interest from year to year, as long as both parties pleased; and it seems clear to me that whatever chattel the intestate had must vest in his administrator as his legal representative." The same principle was recognized and acted upon in *James v. Dean*, (11 Vesey, 383; S. C. 15 *id.* 236,) in which it was held that where a term expired in the lifetime of the testator, who continued to hold and paid half a year's rent before his death as tenant by the year, a renewed lease obtained by the executors was subject to the uses of the will. Chief Justice Tindal in *Atkins v. Humphry*, (2 M., G. & Scott, 658,) says, "I can readily understand that if the testator originally entered under a demise, and the executors do not give up the premises, the assets of their testator may be made chargeable during such term as they virtually retain them in their possession."

The executors could have terminated the lease and relieved the estate represented by them from the charge of the rent, at the expiration of any year, by giving the required notice; but not having done so, the estate is liable upon the contract of the testator and upon the occupation of the executors, who took the term as representatives, and not as assignees. In this view there is no objection to the complaint for a misjoinder of causes of action.

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*Hull against Carnley.*

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The judgment of the supreme court at general term must be reversed, and that of the special term affirmed with costs.

All the judges concurred except RUGGLES, J., who did not hear the argument, and PARKER, J., who dissented.

Judgment accordingly.

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*HULL against CARNLEY, sheriff, &c. and COLTON.*

Chattels which are mortgaged may be seized and the interest of the mortgagor therein sold on an execution against the mortgagor, where they are in his possession, and he, at the time of the seizure and sale, is by the terms of the mortgage entitled to their possession for a definite period.

The officer making the seizure and sale is not liable to the mortgagee, although he sell the property generally without in any way recognizing the lien of the mortgage, and deliver possession of it to the purchaser.

ACTION commenced in the superior court of the city of New-York, in May, 1851, to recover damages alleged to have been sustained by the plaintiff, by the seizure and sale by Carnley, as sheriff, on an execution in favor of Colton against one Michelin, of certain personal property mortgaged by the latter to the plaintiff.

On the trial, before the Hon. Thos. J. Oakley, the following facts appeared: That on the 14th of August, 1850, Michelin, executed to the plaintiff a mortgage, dated that day, upon certain lithographic presses and stones, of the value of \$1125, to secure the payment of two hundred and thirty dollars, as follows, viz: one hundred dollars with the interest thereon in six months from the date of the mortgage, and the balance with interest in one year from its date. The mortgage contained a provision that until default should be made in the payment of the moneys

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*Hull against Carnley.*

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thereby secured, the mortgagor should remain and continue in the quiet and peaceable possession of the property and in its full and free enjoyment; and it in terms authorized the mortgagee, in case default should be made in the payment of the sum secured, to take possession of the property and sell it, and out of the proceeds satisfy the debt and render any surplus there might be to the mortgagor. The mortgage was duly filed on the 15th of August, 1850, pursuant to chapter 279 of the laws of 1833.

On the 28th of September, 1850, Colton, one of the defendants recovered judgment against Michelin for \$480, and on the same day an execution was issued thereon and delivered to Carnley, the other defendant, then sheriff of the city and county of New-York, who, within a few days thereafter, levied on the whole of the property mentioned in the mortgage by virtue of the execution. At the time of this levy the property was in the possession and use of Michelin. On the 25th of October, 1850, the plaintiff served a written notice on Carnley, the sheriff, informing him of the mortgage executed to him by Michelin, where the same was filed, and that the whole amount mentioned therein was unpaid. The sheriff thereupon required and received from Colton an indemnity, and on the 8th of November, 1850, sold the whole of the property by virtue of the execution, without in any way recognising or referring to the mortgage or the plaintiff's lien upon or interest in the property. The sheriff never took the exclusive possession of the property, which consisted of ponderous articles. It remained, intermediate the levy and sale, in the actual possession of the mortgagor; but upon the sale, the sheriff put the purchaser, one Holbrook, in possession of the property, and the latter soon after removed it from the premises, where it theretofore had been used by the mortgagor, to his own premises in the same neighborhood, where it remained till the time of the trial. Immediately after the sale the sheriff paid over the proceeds of the property to Colton and returned the execution. Subsequently, and after the first installment secured by the mortgage became due, the plaintiff demanded the property or the proceeds thereof of Carnley.

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*Hull against Carnley.*

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The counsel for the defendants insisted, that the sheriff was not a wrongdoer; that the mortgagee, having neither the actual or constructive possession or the right of possession, could not maintain an action in the nature of the former action of trespass, trover or case; that there was no injury to or destruction of the property shown, and the mortgagor having the right of possession, the mortgagee could only maintain an action for an injury to the reversion; that the sale by the sheriff could not and did not affect or impair the rights of the mortgagee, and that there was no evidence that he was damaged thereby; that the facts shown did not prove any conversion by the defendants or either of them. But his honor, the said justice, overruled said several grounds of objection, and decided, that the sheriff could not by virtue of the execution legally seize, sell and deliver possession of the property as being that of the debtor, without recognizing the mortgage, or the lien of the plaintiff thereon; that the defendants were wrongdoers in making such seizure, sale and delivery; and that the plaintiff was entitled to recover against them the amount due upon his mortgage; for which sum he ordered judgment against the defendants. The defendants duly excepted; and the judgment having been affirmed at a general term of the supreme court, they appealed to this court.

*E. W. Chester*, for the appellants. I. The sheriff, in levying, was bound to levy on the property in substance, and not upon a right or interest springing out of the property. The property, if rightfully subject to the mortgage, was sold subject to it and was liable to pay the mortgage debt; that is, it continued subject to it notwithstanding the sale. II. The sheriff is only bound to inquire whether he may lawfully levy and sell; he is not required to decide on the validity of the mortgage. *Caveat emptor* applies to the purchaser. He gets the title of the defendant in the execution only. The sheriff is liable to a third person only, in case his right to the property is such that the levy is a trespass. III. The sheriff was not a trespasser; the mortgagee having neither the actual nor constructive possession, nor the right of possession, could maintain neither trespass, trover nor case. In

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Hull against Carnley.

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these actions was formerly to be found a remedy for every injury to personal property. The code has created no new rights, but only changed the form of remedy for a wrong. (*Ward v. Macaulay*, 4 Durn. & East, 489; *Gordon v. Harper*, 7 id. 9.) IV. The mortgagor having the right to the possession, the mortgagee's only action would be in nature of case for an injury to the reversion. This would only lie for an injury to or a destruction of the property. The sale could not impair or affect the right of the mortgagee; his mortgage, notwithstanding the sale, remained a lien on the property in the hands of the purchaser, and he could take it from the purchaser when his mortgage became due, in the same manner as he could from the mortgagor. (*Bank of Lansingburgh v. Crary*, 1 Barb. S. C. R. 542; *Hurd v. West*, 7 Cowen, 752; *Gordon v. Harper*, 7 T. R. 9; *Van Antwerp v. Newman*, 2 Cowen 543; *Jackson v. Parker*, 1 M. & S. 234; 2 Saund. R. 47, (d,) (f) and cases cited; *Bradley v. Copley*, 1 C. B. 685; S. C., 9 Jur. 599; S. C., 14 Law Jour. N. S. 222; *Jackson v. Pisker*, 1 M. & S. 234; 1 Chit. Plead. 71, 72, 157, 8.) V. It is objected that the sheriff did not give notice that he sold subject to the mortgage. He had no right to decide whether the mortgage was *bona fide*—whether it was paid or not. It was enough that he had a right to levy, sell and give possession. It is said that he should have given notice that he sold subject to the mortgage, provided it was valid. Whether he gave such notice or not, all knew that he did so sell in effect, and the mortgagee was not damnified by the want of such notice. The levy and sale are as much a trespass on the mortgagee's rights with the notice as without.

*D. D. Field*, for the respondent. A mortgagee of chattels, though not in possession, nor entitled to possession immediately, has a right of action against a sheriff, or other person, who seizes the entire property and sells it regardless of his rights. (1.) Though a mortgagor in possession for a determinate period may have a leviable interest, that interest does not extend



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Hull against Carnley.

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to the absolute control and disposition of the property. The sheriff cannot sell more than the purchaser can take, and the purchaser cannot take more than the mortgagor had. The mortgagor could not sell the entire property to another, and the sheriff cannot sell more than the mortgagor could have done. (2.) A pledgee may sue for the taking and sale of the entire property pledged on execution against the pledgor. (*Wheeler v. McFarland*, 10 *Wend.* 318.) (3.) A partner may sue for the taking and sale of the entire property pledged on execution against his copartners. (*Waddell v. Cook*, 2 *Hill*, 47; *Walsh v. Adams*, 3 *Denio*, 125; *White v. Phelps*, 12 *N. H. R.* 382.) (4.) For the same reason, it should seem that a mortgagee may sue for the taking and sale of the entire property mortgaged on execution against the mortgagor. A sale would be as injurious to the rights of the mortgagee as in the other cases to the rights of the pledgee or copartners. (*Otis v. Wood*, 3 *Wend.* 498; *Bailey v. Burton*, 8 *id.* 339, 347; *Melville v. Brown*, 15 *Mass.* 82; *Mattison v. Baucus*, 1 *Comst.* 295; *Butler v. Miller*, *Id.* 496.)

DENIO, J. I consider it well settled that chattels which have been mortgaged may, notwithstanding, be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure is entitled to the possession for a definite period against the mortgagee. This was assumed to be the law, in *Mattison v. Baucus*, in this court; (1 *Comst.* 295;) and the principle has been repeatedly recognized by the former and the present supreme court and the late court for the correction of errors, and has never, so far as I know, been denied by any court in this state. (*Otis v. Wood*, 3 *Wend.* 498, 500, *per Savage, C. J.*, citing *McCracken v. Luce*, *unreported*; *Smith v. Dunning*, 7 *id.* 135; *Bailey v. Burton*, 8 *id.* 339, 348; *Wheeler v. McFarland*, 10 *id.* 318; *Randall v. Cook*, 17 *id.* 58; *Bank of Lansingburgh v. Crary*, 1 *Barb. S. C. R.* 542.) The defendants did not therefore do an illegal act in seizing the property on the execution against Michelin the mortgagor. But with a knowledge

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*Hull against Carnley.*

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of the plaintiff's mortgage, the defendant Carnley, as sheriff, by the procurement of the other defendant, sold the property, generally, without any recognition of the plaintiff's lien, and did not in terms, as it is argued he ought to have done, limit the sale to the interest of the judgment debtor. At the time of the sale, as well as when the seizure was made, Michelin was entitled to the possession, no default in paying the mortgage having occurred, and the time for making the first payment not arriving until more than three months afterwards; and the mortgage moreover contained an express stipulation, that until default the mortgagor should be entitled to the possession. I may here mention, in order to present all the material facts in the same connection, that this action was not commenced until after a default in payment had taken place; and that before bringing the suit, the plaintiff demanded the articles of the defendants. They could not, however, give them up, for they were in the hands of the purchaser at the sale.

Assuming the chattel mortgage to have been a valid instrument, (and I see no reason to doubt but that it was such,) the sheriff had a right to sell the interest of the mortgagor and to deliver the property to the purchaser, and the purchaser was warranted in taking it into his possession and in using it for the purposes to which it was adapted, until the day of payment; and he had moreover a right to pay the mortgage debt and thus extinguish the lien. Now, whether the sheriff assumed to sell the whole interest, ignoring the existence of the mortgage, or limited the sale to the mortgagor's interest, expressly recognizing the mortgage and selling subject to it, the rights of the purchaser and of the mortgagee would in either case be precisely the same. The mortgagee would not be deprived of his interest by a sale which did not recognize the mortgage, nor would the purchaser under such a sale acquire any thing more than the interest which was bound by the execution, to wit, the right of the mortgagor to the possession, and the equity of redemption; and these would be the respective rights of the parties if the sale was limited in terms to the interest which could effectually be sold, that is, the

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Hull *against* Carnley.

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title of the mortgagor. The effect of the sale on execution against the mortgagor would be the same as a voluntary transfer of the mortgaged articles by the mortgagor to a third person. Such a disposition of them would not oust the mortgagee, whether his interest was repudiated or was recognized. Such sales, whether judicial or private, pass such title as the vendor, or party against whom the authority to sell exists, had to part with, and no other. The mortgagee, it is true, may be in a worse position, in some respects, by the property passing into other hands, for he must keep sight of it, so as to be able to find and take possession of it when his title shall become absolute by a default in payment. But he is not legally prejudiced, for the mortgagor may, when not restrained by the terms of the mortgage, remove it from place to place at his pleasure. He has the same right to do so which a purchaser on execution against him has. I do not therefore see any reason why such a sale as was made in this case should be considered a conversion of the property, or a disturbance of the mortgagee's title. That title was not divested or interfered with, and there was no disposition of the *corpus* of the property which was not authorized by law. When the mortgagee's title became absolute he could claim his goods in the hands of the purchaser, or maintain an action if they should be withheld from him. Upon principle I am therefore of opinion that the judgment of the superior court cannot be sustained.

I do not think the case of *Wheeler v. McFarland*, (10 *Wend.* 818,) which is relied on by the plaintiff's counsel, tends to prove his position. The property which was in question in that case, was pledged for the payment of labor which had been bestowed upon it, to the full value; and the view which the court took of the case was that the pledgee was in possession, as he must have been, to constitute a valid pledge. The execution was against the pledgor, and the court held that the sheriff who had seised and advertised the property was liable in replevin to the pledgee, because in his advertisement he offered the whole property, and did not propose to sell subject to the plaintiff's lien, but in defiance of it. The authority to sell the pledgor's interest is given

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by statute, (2 R. S. 866, § 20;) and does not contemplate that the purchaser shall take possession by virtue of the sale, until he has complied with the terms and conditions of the pledge. It does not authorize any thing hostile to the interest or possession of the pledgee. The court in that case considered the levy and advertisement as equivalent to divesting the plaintiff of his possession; and as the sheriff had no right to do that, and as the plaintiff could not be deprived of his possession, unless temporarily, for the purpose of a sale, until his lien was extinguished, it was held that the action was sustained against the sheriff. The principle adjudged has no application to a case like the present, where the judgment debtor was entitled to the possession, and the party seeking to recover against the officer had no right to the possession at the time of the sale. The judgment itself was reversed in the court of errors, on the ground that the plaintiff had parted with the possession before the levy. (26 Wend. 467.) But the principle of law which was decided may nevertheless be correct. (See *Bakewell v. Ellsworth*, 6 Hill, 484; *Stief v. Hart*, 1 Comst. 20.)

The cases which have been decided respecting the sale of the goods of copartners or joint owners, upon executions against one partner or joint owner, have a stronger analogy to this case; but I think they do not govern it. (*Phillips v. Cook*, 24 Wend. 389; *Waddell v. Cook*, 2 Hill, 47 and note; *Watch v. Adams*, 3 Denio, 125.) All the partners, or joint owners, have an equal right to the possession with the one against whom the execution issues. The interruption of that possession is an injury, which can be only justified by the process. By assuming to sell the whole interest, when the authority extends only to an aliquot share, and delivering possession to the purchaser pursuant to such sale, the other owners are immediately divested of a concurrent right of possession. The authority to disturb the possession of the other owners is conferred by law, and to be effectual must be exercised in the manner which the law directs; and doing it in any other manner is an abuse of the authority, and renders the officer a trespasser from the beginning. This is the

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*Hull against Carnley.*

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ground upon which the doctrine is placed by Judge Cowen in *Waddell v. Cook*, and upon this principle only can the decision be sustained. In the case under review, there is, as before remarked, no disturbance of any present right of possession. The mortgagee is in the same precise situation after the sale as before. No possession is invaded and no right is disturbed. It would be strange if in such a case a trespass had been committed.

The interest of a mortgagee of chattels out of possession and without an immediate right to the possession, resembles in some respects that of a lessor of goods for a limited term. The lessee in such a case has the present possession in fact and by right, but the lessor has the ultimate property, and consequently the right of possession at the end of the term. The title of the lessee is vendible on execution; but it is not necessary that in conducting the sale, the officer should specify that he sells the interest of the tenant only. A sale in general terms, such as was made of the mortgaged property in this case, passes such title as the lessee had; and inasmuch as the lessor is in no respect injured, he can maintain no action against the sheriff for selling in that manner. That precise question was decided in *Van Antwerp v. Newman*, (2 Cowen, 548,) Chief Justice Savage, in giving the opinion of the court, remarking that the sheriff had authority to sell the interest of the lessee, but that it was not in his power to divest the lessor of his property in the goods, and that he had not done so. The case does not seem to me distinguishable from the one under consideration.

There is another difficulty in the plaintiff's case. How can the defendants be held to be trespassers, for interfering with property, to the possession of which the plaintiff at the time of the act done had no right? In *Ward v. Macauley* (4 T. R. 489,) the plaintiff had demised a house ready furnished, and during the term the lessee had a judgment recovered and an execution issued against him, upon which a portion of the furniture was seized by the sheriff; and the landlord brought trespass against him. The court held that the plaintiff could not recover, on the ground that he was not in possession when the alleged trespass was

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committed; but Lord Kenyon, Ch. J., intimated that trover might have been maintained. A similar question again arose in *Gordon v. Harper*, (7 *id.* 9,) where the action *was* trover against the sheriff for selling goods belonging to the plaintiff in the possession of his tenant; and it was held that the action could not be maintained. Lord Kenyon said that what had fallen from him in *Ward v. Macauley*, to the effect that trover would lie in such a case, was an *extra-judicial* opinion, to which, upon further consideration, he could not subscribe. Ashhurst, J., said that to maintain trover, the plaintiff must have property in the thing, and a right of possession, and that unless both these rights concurred, the action would not lie. Although all the forms of actions are abolished, still we must, in determining the law on a particular subject, in the first place inquire under what forms the right claimed was formerly asserted, and then ascertain from adjudged cases whether an action could be sustained upon the facts of the case under consideration, in any form heretofore used. Trover or trespass would have been appropriate remedies for the injury complained of in this case, if any action could have been sustained. No injury to the property itself was proved, but the complaint was that the defendants had illegally deprived the plaintiff of its possession. On the ground that the defendants were justified by the process in doing what they are proved to have done, and the further ground that the plaintiff had not such a right of possession at the time of the alleged injury as to warrant him in bringing this action, we are of opinion that the judgment of the superior court was erroneous and ought to be reversed.

EDWARDS, J. (Dissenting.) The question which is presented is, whether the right of a mortgagor of personal property to remain in possession for a fixed period, is such an interest as can be taken in execution. The principle has frequently been recognized in our courts that it is. (*Marsh v. Lawrence*, 4 Cow. 61; *Otis v. Wood*, 3 Wend. 498; *Bailey v. Barton*, 8 *id.* 847, 8; *Wheeler v. McFarland*, 10 *id.* 818; *Mattison v. Baucus*, 1 Comst. 293.) And it was expressly so held in the

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case of *McCracken v. Luce*, referred to in 3 *Wend.* 500. It is well settled that the interest of a lessee of personal property is subject to execution. (*Ward v. Macauley*, 4 *T. R.* 489; *Gordon v. Harper*, 7 *id.* 9; *Van Antwerp v. Newman*, 2 *Cow.* 543; *Otis v. Wood*, *supra.*) The interest of a lessee is merely a right of possession and enjoyment for a definite time, and there can be no good reason why an interest of a similar character, in a mortgagor, should not be equally amenable to the claims of creditors. If then a sheriff, under an execution against a mortgagor of personal property, who has a right of possession for a fixed period, levies upon and takes such interest, he incurs no legal liability. He does nothing but what the law authorizes him to do.

But suppose that, instead of taking the mortgagor's interest, he takes and sells the property absolutely, does he then incur any liability? He certainly does not during the period fixed for the mortgagor's possession, as the mortgagee has neither possession, nor the right of possession, and as no injury is done to the reversion, he has no present cause of action. (*Gordon v. Harper*, *sup.*) But is the mortgagee without remedy against the sheriff, after the time limited for the mortgagor's right of possession is at an end? I think not. It has been said, and undoubtedly truly, that after the mortgagee's right to the property has become absolute, he may claim it wherever he can find it. But it does not follow that this is his only claim. In the present case, it appears that the defendants knew that the property levied upon was subject to the plaintiff's mortgage. They knew that under that mortgage the mortgagor claimed no other interest in the property than a right of possession, and, instead of taking and selling that interest, the defendant Colton, who was the plaintiff in the execution, gave a bond of indemnity to the sheriff, who thereupon took the property and sold it absolutely; treating the mortgage as fraudulent and void.

After default was made in the payment of the money secured by the mortgage, the plaintiff demanded the property from the sheriff, and upon his refusal to deliver it, he having sold it, the

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plaintiff brought this action. At the time when the action was commenced, the plaintiff was entitled to the possession of the property as absolute owner; it had been taken by the defendants, and they were accountable for it, unless they could show a sufficient legal justification for their acts. They could not justify under the execution; for that was against the mortgagor, and authorized a sale of his interest only. They could not say that the only claim of the mortgagee was against those who were then in possession of the property; for the defendants had been wrongdoers from the beginning, and when the plaintiff's right to the possession accrued they were still wrongdoers, and could only discharge themselves by a delivery of the property, or at least, by satisfying the debt of the plaintiff.

But it is said on the part of the defendants, that the sheriff, having a right to take possession of the property for the purposes of the sale of the mortgagor's interest, and to deliver possession to the purchaser, was not bound to state that the property was subject to a mortgage. The answer to this is, that the execution authorized him to sell the property of the defendant in the execution, and nothing more. If he chose to sell the property of a third person, there is no immunity which protects a sheriff, who thus acts without right, any more than it will protect any other wrongdoer. In the case of a lease of personal property, the sheriff who has an execution against the lessee has a right to take possession of the property, and to deliver possession to the purchaser of the lessee's interest; but it does not follow that he has the right to treat the property as if the lessee were the absolute owner. Neither would he be justified in saying to the lessor, after his right of possession had accrued, that although he had no right to sell the property absolutely, yet that the only claim of the injured party was against the purchaser, or the party then in possession. If such a justification was allowable, then we would have this extraordinary principle established, that an execution creditor of a lessee of personal property, or of a mortgagor having a right of possession for a limited time, might sell the whole property, and receive its full value, or in



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other words, might treat the lessee, or mortgagor in possession, as the absolute owner, without subjecting himself to any liability whatsoever. Such, I think, is not and cannot be the law. But, for the purpose of testing the principle, let us carry it out in its practical operation, and see where it will lead us. If a sheriff, under an execution against a judgment debtor, who has an interest in personal property, either as lessee or as mortgagor with the right of possession for a definite period, can sell the property absolutely, and obtain the full value thereof, the purchaser at such sale may do the same thing. There is no distinction between the two cases. The right of the purchaser is equal to that of the sheriff. It follows then that, as far as the claims of judgment creditors are concerned, a lessee, or mortgagor in possession of personal property, is in effect the absolute owner during the continuance of his term, and may be so treated. The judgment creditor thus possesses a privilege which, hitherto, he has probably never dreamed of. It will be no longer necessary for him to contend that the possession of the mortgagor furnishes evidence of fraud; neither will it be necessary for the sheriff to require a bond of indemnity against damage, in case that he sells the property absolutely, and treats the mortgage as a nullity. The rights of the mortgagee will undergo a suspended animation until the term of the mortgagor is at an end, and then the only rights that the mortgagee will have will be to claim possession of his property, if he can find it. But I am told that the mortgagee might be subjected to inconveniences, even if nothing but the interest of the mortgagor were sold. If so, and they were simply the natural consequences of proceedings strictly legal, no one would have any cause for complaint. But the case is very different as to the consequences of an illegal act. In the present case, it appears that the sheriff was unwilling to treat the mortgage as fraudulent and void, and it was not until the judgment creditor gave him a bond of indemnity that he would consent to do so. But, if the doctrine contended for be sound, this was a useless ceremony. The sheriff thought that unless the mortgage was found

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to be fraudulent, he would be liable as a wrongdoer ; but in this he was mistaken.

I think that the fallacy on which this conclusion is founded, arises from confounding property in a thing, with the thing itself. The chattel which is the subject of a mortgage with a right of possession reserved to the mortgagor is one thing, but the right of property in the chattel, is a different thing. The chattel is single, but it is the subject of two kinds of property. The right of possession for a limited time is one species of property, and is vested in one person ; the absolute right of property, or the reversion, is a different kind of property, and is vested in another person. It is said, however, that the sheriff who sells the whole property under an execution against the mortgagor does no wrong, for the reason that the purchaser cannot acquire a title to any more than the sheriff had a right to sell. If that be good reasoning, then it may with equal propriety be said that when a sheriff in an execution against A. takes and sells the property of B., he does no wrong, for the purchaser acquires no right to the property thus sold. Property of which A. is owner cannot be taken and sold under an execution against B., and I cannot see upon what sound principle of logic the property of A. can be made liable for the debt of B., when that property arises out of a thing in which B. has another and a totally different kind of property, any more than it can be when the subject matter of property consists of two different things. A sheriff must always make a levy at his peril ; that is, under an execution against A., he can take and sell only the property of A., and if he takes and sells the property of B. he must suffer the consequences. This has never hitherto been considered as a hardship ; and I can see no reason why it is a greater hardship to insist that the sheriff shall respect a right of property of one kind, than it is to insist that he shall respect a right of property of another kind.

The case of *Van Antwerp v. Newman*, (2 Cow. 548;) has been referred to as sustaining the doctrine contended for on the part of the defendants. In the marginal note of that case, it is

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stated that if a sheriff, who has an execution against a lessee of personal property, sell the goods as the absolute property of the tenant, not mentioning his special property, though he knew of it, no action lies against him for this act, at the suit of the lessor, for it does not divest the lessor's right, or impair his reversionary interest. The rule here laid down is unqualified, and it seems to sustain the doctrine contended for by the defense. But it will be seen, upon examination, that the reporter's note is not warranted by the decision. Indeed no such decision could have been made upon the facts of the case before the court. The statement of the case says that the sale was made, and the action commenced, during the term for which the goods were out upon lease; and the court in giving their opinion say, not that the owner of the reversion would not have a right of action at any time, but that he was premature in bringing his suit, thus leaving the implication that the suit might be commenced when the lease was at an end. In my judgment, the doctrine contended for by the defendants is without authority, and cannot be sustained upon principle, and there is good reason to fear that its adoption will be productive of mischievous consequences.

I think that the court below held correctly that the defendants are liable to the plaintiff for the whole amount secured by his mortgage with interest, it being less than the admitted value of the property, and that the judgment should be affirmed.

GARDINER, C. J., SELDEN, PARKER and ALLEN, Js., concurred in the opinion of DENIO, J. JOHNSON and RUGGLES, Js., took no part in the decision.

Judgment reversed.

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St. John *against* American Mu. Fire and Marine Ins. Co.

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ST. JOHN and others *against* THE AMERICAN MUTUAL FIRE  
AND MARINE INSURANCE COMPANY.

A policy, by which property was insured against loss or damage by fire, contained a condition that the insurer would not be liable for *any loss occasioned by the explosion of a steam boiler*; and there was an explosion of a steam boiler in use in the building where the property was situated, whereby fire was brought in contact with and consumed the property; *Held*, that the loss was within the exception created by the condition, and the insurer not liable.

APPEAL from a judgment of the superior court of the city of New-York. The action was upon a policy of insurance issued by the defendants to the plaintiffs. On the trial before Campbell, J., in May, 1853, the plaintiffs read in evidence the policy of insurance, which was dated the 31st of March, 1849, by which the defendants insured the plaintiffs during one year "against loss or damage by fire, to the amount of two thousand dollars, on their machinery and fixtures for blowing fur and forming hat bodies, including shafting and fixtures for communicating power, contained in the brick building situate Nos. 5 and 7 Hague street, in the city of New-York, occupied for mechanical purposes; the policy to cover lathes and tools for making machinery contained in the building." Among the conditions annexed to, and forming a part of the policy, was the following: "This company will be liable for losses on property *burnt* by lightning, but not for any loss or damage by fire happening by means of an invasion, insurrection, riot or civil commotion, or of any military or usurped power, nor for any loss *occasioned by the explosion of a steam boiler*, or explosions arising from any other cause, unless specially specified in the policy." The plaintiffs proved that there was a steam engine and boiler in the basement of the building in which the insured property was contained, used in propelling machinery; that on the fourth of February, 1850, there was an explosion of the boiler which threw down the building, and immediately thereafter smoke and

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flames issued from the ruins, and the building and its contents, including the property covered by the policy, were consumed. The plaintiffs read in evidence the proofs of loss delivered by them to the defendants soon after the destruction of the insured property. In their affidavit, composing a part of these proofs, the fire and the manner in which it originated are stated and described as follows: "That on the fourth day of February, 1850, a fire occurred in the said building, numbers 5 and 7 Hague street, whereby great and immediate loss and damage were sustained by deponents, by the injury done to their property insured as aforesaid. That the said fire originated on the said fourth day of February, 1850, and was immediately preceded by an explosion of a steam boiler on the said premises, whereby the walls of the said building were mostly thrown down, and the fire which was used in the furnace of the steam boiler, and in stoves in various parts of the said building, was communicated to the frame and wood work of said building, and the materials and machinery contained therein."

At the close of the plaintiffs' case, the counsel for the defendants moved the court to dismiss the complaint, on the ground that it appeared from the evidence that the insured property was brought into contact with the fire solely by means of the explosion of the boiler, and that thus the loss, so far as the same was caused by fire, was occasioned directly by such explosion of the boiler; and that, by the express conditions of the policy, the defendants were not liable for loss so occasioned. The justice granted the motion, and ordered judgment dismissing the complaint, and the counsel for the plaintiffs excepted. This judgment was affirmed by the superior court at general term; and the plaintiffs appealed to this court.

*A. L. Jordan*, for the appellants.

*C. P. Kirkland*, for the respondent.

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DENIO, J. As the sole peril insured against by this policy of insurance was loss or damage by fire, we should naturally expect, in examining exceptions contained in the contract, to find pointed out some circumstances under which the insurers would not hold themselves liable though a loss by fire should take place. Hence a loss occasioned by invasion, insurrection, riot and the like, has usually been found excepted in such policies; and although in this, and perhaps in policies generally, the exception in this respect is in terms of losses by fire, the clause would be equally definite and intelligible if those words were omitted in the clause stating the exception. When, therefore, this policy proceeds to declare that the defendants will not be liable for any loss "occasioned by the explosion of a steam boiler," it refers *prima facie* to such a loss as by the prior provisions of the contract the defendants would be bound to indemnify against, and not to one which would not be embraced in the general terms of the policy, and as to which there was no occasion to introduce an exception. The most usual consequence of the explosion of a steam boiler, is the breaking and rending the building in which it is contained and the movable property therein; and if this were the only consequence to be apprehended from such an occurrence, the exception introduced into this policy would be quite unnecessary, and we may presume it would not have been inserted. It would not be a loss or damage by fire, unless there was combustion, and then only to the extent of the damage properly attributable to the combustion. (*Millandon v. New Orleans Insurance Company*, 4 Rob. Lou'a R. 15.) In one sense it is true the explosion is the consequence of fire, as steam is created by the application of heat; but it is understood that where fire is applied by design, as in culinary and several manufacturing processes, and a loss occurs in consequence of overheating or other misapplication of fire to the subject upon which it was intended to operate, and the injury is limited to that particular subject, such damage is not considered a loss by fire within the meaning of this class of contracts. (*Beau-*

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*mont on Ins. 37 and seq.)* But another very usual concomitant of the explosion of a steam boiler is that the place in which it is situated is set on fire. Though this is not universally the case, it is sufficiently common to constitute a subject of consideration in entering into contracts for insurance. As the furnace is required to be in immediate proximity to the boiler, and as the explosion usually overturns and displaces every thing in its vicinity, the danger of a loss by burning is very imminent. I think, therefore, we must understand by the assertion that the company will not be liable for any loss occasioned by the explosion of a steam boiler, that the defendants contracted for an exemption not from responsibility for such losses as they would not be bound to make good if no such clause had been inserted, but for those which by the preceding terms of the policy they had agreed to indemnify against, and which were very likely to be caused by an explosion. It is true, as argued by the plaintiffs' counsel, that the language would have been more distinct and certain if the words *by fire* had been inserted, as in the earlier member of the sentence where losses by invasion, &c., are excepted; but where we see that the comprehensive words, *any loss*, are used in the place of *any loss or damage by fire*, we cannot, upon any authorized rules of interpretation, hold that a restricted meaning was intended.

It is also true, as was insisted at the bar, that where the proximate cause of a loss, either in a marine or a fire policy, is one of the perils expressly insured against, the insurer cannot escape responsibility by showing that the property was brought within that peril by a cause not mentioned in the contract. The familiar example of a loss attributable to the negligence of the servants of the assured has recently been before this court, and we have recognized the principle to be as stated by the plaintiffs' counsel. (*Matthews v. The Howard Ins. Co.*, *ante*, p. 9.) If, therefore, there had been nothing said in this policy respecting a steam boiler, this loss, having been occasioned by fire as its proximate cause, would have rested on the insurers, though it had been shown, as it might have been, that the fire was kindled

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by means of the explosion. But this principle does not, I think, aid the plaintiffs. The doctrine is, that the courts will not go back to the remote cause where the immediate one belongs to the class insured against. Hence, as before remarked, the negligence of servants does not relieve the insurers. But suppose, by the very terms of a policy against fire, the parties agree that the insurers shall not be answerable for losses occasioned by the negligence of the servants of the assured, and it is found that a dwelling insured has been burned by the neglect of some necessary precaution which should have been taken by the housekeeper of the assured. It would clearly be a loss within the very terms of the exception, and the insurers would be discharged. The case is the same here. The parties knowing that fires were liable to be kindled by the explosion of a steam boiler, and that by the general terms of the policy the insurers would be liable for a fire thus originating, agreed that for such losses the party would be his own insurer.

The loss is within the terms of the exception, according to its popular meaning as well as its grammatical construction, and I do not see any thing in the nature of the case which would warrant us in indulging in a criticism which should give the language a different meaning.

There is, as was mentioned on the argument, a possible case where the language in question would not be entirely unmeaning upon the construction contended for by the defendants' counsel. An explosion may be caused by a fire exterior to the boiler or furnace, and the building and moveables may be injured by the force of the steam, though no combustion takes place, and it may be true that the insurer would be protected from answering for that loss by the exception in question. But this theory requires a set of circumstances so unlikely to happen, that I cannot think that the contract was framed with any view to them. We shall, I am persuaded, be more likely to construe the contract according to the intention of the parties, by adopting that interpretation which is most natural and obvious, rather



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than to suppose possible cases, very unlikely to happen, and which it is improbable the parties had in view.

I am of opinion, therefore, that the judgment of the superior court should be affirmed

JOHNSON, J. The question in this case is, whether the loss sustained by the plaintiffs by the burning of their property, under the circumstances of this case, was a loss occasioned by the explosion of a steam boiler. If it was, the defendants have expressly stipulated that they shall not be charged with it.

Several interpretations of the clause in question offer themselves for consideration. In the first place, it may be that the clause was introduced to exclude the mere injury by explosion without fire, and that although such an injury is not by law to be borne by an insurer against fire, yet that the insurers thought it wise to guard against the possibility of its being considered a loss by fire. That such a loss has been sought to be recovered as a loss by fire, though unsuccessfully, (*Millandon v. New Orleans Insurance Co.*, 4 *Lou'a R.* 15,) and that the clause in question immediately follows a stipulation in respect to liability for property burnt by lightning, which undeniably is merely a statement of the exact measure of the liability which the law imposes in the absence of any stipulation, are grounds for taking the view suggested of the clause in question.

Another interpretation suggested applies the exception to damage produced by explosion, when the explosion is caused by a fire which itself comes within the perils insured against: as in case a fire should occur in the engine room and its heat should cause the boiler to explode. Upon the interpretation suggested, the damage occasioned by the explosion would not be recoverable against the company. Still another interpretation applies the exception to any loss by fire occasioned by the explosion, and so exempts the company from responsibility for the loss in this case. This interpretation was adopted by the superior court, upon the ground that every stipulation in a contract should be so expounded as to give it some operation, and that this clause could

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have none unless it was so construed. Though the principle of exposition on which that court proceeded is sound, we have already seen that the clause is capable of meaning, without recourse to the particular interpretation put upon it in that court. Neither of these proposed interpretations is entirely satisfactory. The general peril against which the defendants undertook to indemnify the plaintiffs was "immediate loss or damage by fire." That was the subject matter, and the only one about which the contract was made. All the defendants' relations with the plaintiffs grow out of that one subject matter; and any qualifications of their liability, contained in the contract, presumptively relate to the indemnity which they have contracted to afford to the plaintiffs, and to cases which but for those qualifications would or might be covered by the contract for indemnity. The language used, construing it with reference to the subject matter, is equivalent to a declaration on the part of the insurers that they are not to be held responsible for any loss, whether it comes within the general peril of fire or not, and without undertaking to consider whether it does or not, if such loss happen to be occasioned by the explosion of a steam boiler. This is, I think, the fair sense of the language employed. The prominent intention is to exclude the risk from the explosion of steam boilers—not the risk merely of the exploding force, but all risk. That peril the insured were content to bear. Among the risks consequent upon an explosion, the most prominent, next to the direct destruction by the explosive force, is the hazard from the fire of the furnaces and other fires in the building being thrown about among combustible matter. So patent is it, that no one can contemplate the event of an explosion, without recognizing this risk as one of the most obvious and important hazards attending upon such an event. Only one casualty happened to the premises and occasioned the destruction of property which the defendants are called upon to answer for. That was the explosion of the boiler. The burning was the direct and natural consequence of the explosion of the boiler, although it did not necessarily follow that fire would take place. It was as direct

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a consequence as the falling of the walls would have been in case the explosion had broken but a single timber, and the walls had not fallen for some hours. In such a case it might be argued that the explosion broke but one timber, which brought too great weight upon some other, which giving way produced the catastrophe, and that therefore the fall of the whole was not a direct consequence of the explosion. The answer in both cases is, that the resulting destruction followed from the original casualty, without the intervention of any new cause, and followed from the nature and condition of the subject at the time of the casualty. The breaking of the beam in the supposed case, and the scattering of the coals from the stoves in the actual case, are the direct and immediate consequences of the explosion of the boiler; the fall and the fire are the natural consequences, due to no new casualty, but resulting from obvious natural forces, operating under the circumstances produced by the original exploding force. The whole loss in both cases is the immediate consequence of the explosion of the boiler. It was urged upon the argument that as fire was the actual means of destruction of the property in question, the court could not look back beyond the fire, upon the familiar principle, "*causa proxima non remota spectatur.*" It is undoubtedly true, that if the policy contained no exception, this loss would clearly have been a loss by fire. There would be no occasion to consider how the fire happened, the parties not having contracted for indemnity against fire occurring only in particular ways, but generally against fire. The existence of the exception renders the inquiry necessary to enable us to say whether the loss is within its terms, and the meaning of those terms we have already considered. It was also argued, that if the parties had intended to except loss by fire, occasioned by the explosion of a steam boiler, those words should have been used; but that would have narrowed the exception to losses by fire only, whereas the language now used is broad enough to cover all losses so occasioned, whether by fire or explosive force, or in any other way in which losses by the excepted peril could be produced. The judgment should be affirmed.

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PARKER, J. In this policy of insurance against fire was an exception in the following words: "This company will be liable for losses on property burnt by lightning, but not for any loss or damage by fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, *nor for any loss occasioned by the explosion of a steam boiler*, or explosions arising from any other cause, unless specially specified in this policy." It is a question of law whether the facts of the case, which are undisputed, are covered by this exception of the policy.

The policy must be so construed, if practicable, as to give effect to all its parts and make them severally consistent with each other. The insurance being against damage by fire alone, the exception of loss occasioned by the explosion of a steam boiler would be needless and entirely inappropriate to the subject of the contract, unless it had some reference to damage done by fire. I think this clause was inserted with reference to the agency of fire, not in burning after the explosion, but in causing the explosion itself. All explosions of steam boilers are referrible to the action of fire. Without fire, there could be no steam and no explosion; and I think it was to save all doubt as to the question whether the destruction consequent upon an explosion was caused by fire, that the exception was inserted. That doubt may have been suggested by *Waters v. The Merchants' Louis. Ins. Co.*, (11 Peters, 213,) and *Millandon v. The N. O. Ins. Co.*, (4 Lou'ia R. 15.) The insured premises, having on them a steam engine and boiler, were much more exposed to injury than they would have been without them; but by making an exception, which threw upon the insured the risk of injury from explosion, the premises could be insured at the same premium as other premises on which there were no engine and boiler. The ordinary risk was thus cast upon the insurer, the extraordinary risk upon the insured. I do not think the parties to the contract had in view, at the time it was made, any other fire than that which, by its heat, caused the explosion.

But they provided, in express terms, that the insurers should

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not be liable for any loss occasioned by the explosion of a steam boiler. This is a full and complete protection against loss of every description which might be occasioned by such explosion. Such explosion might occasion loss in different ways. It did so in this case; and because fire happened to be one of the means of destruction, it does not take that portion of the loss out of the exception and bring it within the general terms of the policy. The burning was as much a consequence of the explosion as the breaking and destruction from expansion. All were "occasioned" by the explosion. The explosion was caused by fire, but, with all its immediate consequences, it was excepted from the operation of the policy. The injury by fire is plainly within the exception, as the injury would have been, if the property had been destroyed by water in consequence of the breaking of the water-pipes by the explosion.

As to the extent to which consequential damage may be traced and charged to the moving cause, I suppose the same rule applies to the exception as to the policy itself. In an action on the policy for loss by fire, the insured would be indemnified not only for goods actually burned, but also for those wet and soiled, for furniture cracked and warped, and under some circumstances, for goods stolen and lost by the removal of goods. The construction I have put on the extent of the exception is certainly not broader. The fire was an immediate consequence of the explosion; and the loss of property by fire, as well as by breaking and displacement, was clearly occasioned by it.

The plaintiff could not recover for any damage caused by the explosion; and I think he had no more claim for that done by burning, than for that portion broken and crushed by the concussion. The judgment of the superior court should be affirmed.

RUGGLES and EDWARDS, Js., were in favor of affirming the judgment.

SELDEN, J., did not hear the argument, and took no part in the decision.

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St. John *against* American M. Fire and Marine Ins. Co.

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GARDINER, Ch. J., (dissented.) The insurers say in that part of the condition of the policy, which has a supposed application to the case before us, "that they will not be liable for any loss *occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy.*" The loss however, for which indemnity is sought in the present action, was occasioned by fire; such is the statement of the insured in their affidavit, of the magistrate in his certificate, of the witnesses upon the trial, and of the counsel of the defendants, in their motion for a nonsuit; and if there could be a question as to the proximate cause of the injury, it was for the jury, and not for the court to determine. The plaintiffs were, however, nonsuited. The decision was sustained by the superior court, who held that the explosion was the proximate cause of the loss, and that the underwriters were consequently exempt from liability by force of the condition. If the learned court were correct in their premises, there can be no question as to the justice of the conclusion.

I had supposed that no one would contend that loss by fire, and loss by explosion, were equivalent expressions, in themselves considered, whether found in the condition of an insurance policy or elsewhere. Explosion and fire may stand to each other in the relation of cause and effect, but the two things are not identical. Indeed it was not claimed upon the argument that the explosion consumed the goods, but that it threw down stoves standing on the premises, and scattered the coals contained in them, bringing them in contact with the property, which in consequence took fire and was destroyed. Now if the explosion had been a conscious agent of the insured, and had committed the same act; or if a servant through carelessness had overthrown the stoves, and the same consequences in every particular had resulted; the fire in the case supposed would have been the immediate, and the act of the servant the remote cause of the loss; and as the damages resulted immediately from the peril insured against, the insurers would have been held liable. So much has been repeatedly adjudged elsewhere, and the princi-

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ple was recognized and affirmed in this court, in *Mathews v. The Howard Ins. Co.*, (1 Kern. 9.) But the act of the servant, and the explosion of the boiler in this case, stood in the same relation to the loss of the property. Neither was the proximate cause of the damage, but the *causa causarum*, or remote cause of the loss. If there is a distinction in this respect between the two, it devolves upon those who rely upon it to state that distinction intelligibly. The attempt was made upon the argument; but when analyzed, the explanation amounted to this, that the explosion preceded the fire, and by its force brought coals to the goods, or goods to the coals, so that they took fire and were consumed; that the ultimate result followed the explosion so quickly, that the last must be held to be the immediate or proximate cause of the loss. Thus when pressed for the proximate cause of the loss, they give us the cause of the fire, and we thus come back by a circle to the point of departure. Indeed no argument would convince a man of ordinary understanding that, in the chain of sequences, the fire was not next to the loss, which was the immediate consequent of the fire, or that the explosion was not back of the fire; but as the transition from one to the other was rapid, therefore it is argued that the explosion was next to the loss; or at any rate, may be called proximate, within the condition of this policy. In this way, the order of events, as they occurred, is changed by affirmation, and a verbal unity established, by confounding subjects which are as distinct as steam and fire. But one authority is invoked, and it is said that in 11th *Peters*, (213,) the court held that loss by the explosion of gun powder was a loss by fire, as its proximate cause. But in that, and similar cases, the powder when ignited became fire, and other things being equal, the force of the explosion was in proportion to the rapidity of the combustion. If the steam generated in this boiler underwent a similar chemical change, and the explosion was due to the combustion of water in a state of vapor as its cause, the authority is in point. Otherwise, it has no more application to this case than to an explosion occasioned by the freezing of a

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liquid. We are not, therefore, constrained by authority to declare that to be legally true which is physically impossible. And it is consolatory to know that the law may be maintained without outraging science.

My conclusion is, that as "loss by fire" in this policy, as we all agree, means a loss, of which fire is the proximate cause, so "loss by the explosion of a steam boiler" should receive the same construction, and include those losses, of which the explosive force is the immediate cause, if we intend to abide by the authority of adjudged cases, or the language of the condition. The insurers so understood this provision. This is apparent from the first clause of this condition, by which they declare, "that they will be liable for losses on property *burnt* by lightning." Here the distinction is marked by them, between the mechanical force exerted by electricity and ignition, arising from its contact with a combustible substance. Both may concur in producing an injury. A house may be prostrated, and set on fire by the same stroke. But the forces are different; the one is mechanical, the other chemical; and for a loss arising from the latter only, as its immediate cause, are the underwriters liable. So, in the clause in question, the insurers declare that they will not be liable for losses to property occasioned by any explosion; that is, by the forcible expansion of any elastic fluid; which is the definition of explosion. (*Web. D.*) They in both clauses refer to a mechanical force put forth and resulting in an injury to the property insured. In the first, their exemption is necessarily implied; in the last, it is expressed; and this is the only difference between them.

Let us now suppose that the manufactory of the plaintiffs had been struck by lightning, and burning coals had been scattered by the shock so as to ignite the property insured, the defendants, all admit, would be liable for the loss, as falling directly within their general obligation to indemnify against damages by fire. That case is not distinguishable from the present. And yet what man, not under the control of a committee, would pretend, that in the case supposed, the property was burnt by



lightning. And yet such conclusion is inevitable, by the same reasoning which establishes that the elastic force of steam in shattering the engine in which it was compressed, became the proximate cause of the burning, in the case before us.

There is another proposition, which has its advocates, which assumes that the explosion was the remote cause of the loss, but affirms that it is, notwithstanding, within the condition, because, otherwise, no sensible interpretation can be given to the clause in question. In other words, the clause rendered as it reads would be useless, as it would merely exempt the insurers in terms from an obligation which was never imposed upon them, in any event, by the policy. On this construction the policy and condition would read as follows: The insurers will be liable for all losses of which fire is the immediate cause, and they will not be liable for any loss by fire, of which an explosion is the remote cause. The first answer to this hypothesis is, that such is not the language of the condition, and the interpolation can only be justified on the ground of absolute necessity. 2d. That no such necessity exists; because if the assumption upon which the proposition rests was true, which it is not, it would not authorize a change of phraseology, which is intelligible as it is, although unnecessary. 3d. The principle applied to the third clause, would require amendment also, of the first and second clauses of the same condition for the same reason. The first provision in reference to lightning is useless, because it leaves the liability of the insurers precisely as it would be if stricken from the policy. The second clause as to "riots and civil commotion" is superfluous, because the same provision in *his verbis* is found in the body of the policy. As two out of the three provisions of the condition are superfluous, it would not be a serious imputation upon the wisdom of the insurers if the third was in the same category. This was rather to have been anticipated, if there is any thing in the maxim, *noscitur a sociis*. At all events, it does not follow that because two thirds of a condition are unnecessary, that the remainder must provide an immunity which the law would not grant without it.

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But there is another answer to this proposition. It is founded on an assumption which is false in fact. So far from the condition as written being useless, it embraces and excepts every loss of which an explosion is the immediate cause, whether caused by fire, or arising from the combustion of the explosive substance, or otherwise. Upon this part of the argument, the case in 11 *Peters*, (*supra*,) seems to have been overlooked, though strongly pressed upon the question of proximate cause. There it was held, that loss by the explosion of gun powder was within the policy, which was against fire generally. But it was entirely competent for the underwriters in that case, and in all others, to declare that they would not be liable for damages occasioned by the explosive force of the powder. That is what the insurers have done by this condition. So in the case of camphene, and of every other explosive material. The same immunity would be secured to the insurers, if the manufactory of the plaintiff had taken fire, and steam had been generated by the heat, and the boiler had in consequence exploded, working the injury to the building and machinery that is shown by the evidence. But it is unnecessary to multiply examples. It is enough that entire classes of hazards are found which are exempted from the general obligation imposed by the policy, by the terms of this condition as written. It has therefore a practical operation. And the argument based upon its immateriality, weak as it is, is wholly fallacious. And lastly, it is said, that if the word "carelessness" was substituted for "explosion" in this condition, it would point to a remote cause, and that "explosion" may therefore admit of a similar construction. But "carelessness" is a quality attributable to an intelligent agent only; it cannot of itself, it is presumed, directly ignite, or destroy any thing. Explosion, on the contrary, is a physical force, and as such may be the immediate cause of a physical injury.

For the reasons assigned, I think the defendants have by their policy said to the plaintiffs, we will indemnify you against loss or damage by fire, but we will not indemnify against loss

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occasioned by the explosion of your steam boiler, whatever may be the cause of that explosion. If your machinery is rent by lightning, or by steam, and fire ensues, what is burnt is our loss; what is destroyed by the explosion is your own. This, as it seems to me, is the spirit of the contract. If, however, there is doubt as to its meaning, it should be remembered that it is the language of the defendants, and is not to be extended in their favor by construction.

The claim of the plaintiffs, supported by evidence, is for a loss for property burnt or damaged by fire, and not for property crushed, mutilated or destroyed by force of an explosion; and I think they are entitled to have their claim submitted to a jury, and that the judge erred in directing a nonsuit. Such is my opinion. Five of my brethren think otherwise, and the judgment will be affirmed. If the majority had agreed in their reasons for the decision, I should have dissented without assigning the grounds for my opinion. But of the two propositions discussed, one or the other of which is essential to the defense, neither has received the sanction of this court. The judgment is sustained by a concurrent vote, founded not merely upon different, but adverse reasons.

ALLEN, J., delivered an opinion to the same effect as the foregoing by Gardiner, C. J.

Judgment affirmed.

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*Hood against Manhattan Fire Insurance Company.*

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**HOOD against THE MANHATTAN FIRE INSURANCE COMPANY.**

A policy of insurance against loss by fire, which describes the subject matter as a barque on the stocks, near a ship yard, being built for Howes, Godfrey & Co., does not cover timbers not united to the keel or structure thereon of the contemplated barque, although they are intended and completely prepared to be used in its framework, are lying in the yard in the proper place to be conveniently applied to that use, and are valueless for any other vessel. Such a policy covers the structure made from time to time on the stocks, which, when completed, will constitute the barque.

ACTION brought in the New-York superior court upon a policy of insurance against damage by fire. On the trial, before Mr. Justice Oakley, the following facts appeared. The firm of James M. Hood & Co. were ship builders, having a ship yard in Somerset, Massachusetts; and on or about the 8th of September, 1849, the defendant, by a policy dated on that day, insured the firm against loss or damage by fire, to the amount of seven thousand five hundred dollars, "on a ship on the stocks, in a ship yard on the west side of Taunton river, in Somerset, Mass." Such insurance was to continue until the first day of November ensuing. On the 20th of September, 1849, the insurance was by the parties transferred to another subject, by a writing entered upon the policy under the above description of the ship, in the following words: *This insurance is transferred to cover a barque (on the stocks near said ship) building for Howes, Godfrey & Co., with privilege to build another vessel alongside.* On the 26th of the same September, the firm of Hood & Co. effected an insurance against loss or damage by fire, in the New-York Fire and Marine Insurance Co., upon "the lumber and building materials contained in the ship yard" aforesaid. On the morning of the 17th of October, 1849, a fire originated inside of a ship on the stocks, the keel of which was about sixty feet north from the keel of the barque. At this time the keel for the barque was blocked and in its place, and a part of the frame was moulded, hewn and leveled, and

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some of it had been laid across the keel and fastened to it; the whole frame was in the yard, and from two thirds to three fourths was moulded; the stern frame and stem frame were alongside the keel, and had been fastened together, and were ready to be put up. The fire consumed four hundred and sixty-two sticks of timber which had been prepared and were intended to be put in the barque. This timber would have made forty-four frames and was ready for framing. Nothing remained to be done to or with it, except to put it together in frames, and place them upon the barque. These frames were not to be fastened to the keel by bolts; they were to be shoved between the keel and kelson. This timber had been so far adapted to the barque that it was useless for any other vessel. When consumed it was in the yard north of the keel of the barque, and in the usual place for laying timber for a vessel like the barque, which was being constructed. Neither the keel of the barque, or the frames fastened to it, or the stern or stem frames, or any timbers lying south of the keel, were injured by the fire. It appeared that the firm of Hood & Co., in their proofs furnished to the defendant in support of their claim for loss by the fire, described this timber as "lumber and timber prepared to be placed in a barque in the process of being built;" as "four hundred and sixty-two pieces of timber prepared and ready to be put into the frame of said barque of the value of \$5.50 each." The plaintiff was a member of the firm of James M. Hood & Co., and became the exclusive owner of the policy of insurance and the claim against the defendant thereon, by an assignment from his copartners made subsequent to the loss.

The counsel for the defendant insisted that the plaintiff was not entitled to recover, because the policy did not cover the property proved to have been destroyed by the fire, and that there was no proof that the property mentioned in and insured by the policy had been injured by fire. But his honor the said justice decided that the defendant was liable for the loss sustained by the destruction of said timber so prepared and ready to be placed in said barque as aforesaid, and directed the jury to find a ver-

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dict for the amount of said loss and interest. To which decision and direction the counsel for the defendant excepted. The jury rendered a verdict in favor of the plaintiff for \$2,869.44, upon which judgment was entered. A bill of exceptions was made, and the judgment having been affirmed by the superior court at general term, (*see 2 Duer*, 191,) the defendant appealed to this court.

*M. S. Bidwell*, for the appellant. I. The sticks of timber were not covered by the policy. 1. They were not a barque. Though intended and *partially* prepared to be put into the barque which was the subject of insurance, they had not become a part of it, and were not ready to be put into it, nor were they even framed together; and they could not have become a part of the barque until more work had been done upon them. A barque, like a house, is essentially different from its materials collectively; as water is different from its component gases. It is a result of their combination in certain proportions. Though the materials exist, it would be absurd to say that the barque or house exists, until the materials are put together; or that the materials are a part of the barque or house, until they are affixed to the nucleus of the structure while in progress. The ship results and begins to exist when the materials are adjusted and put together in certain permanent positions. The materials lose the character of lumber, &c., and become barque or ship, &c., as fast as they are worked in and thereby incorporated in it. 2. The insurance was confined to a structure *on the stocks*. There was, at the time of the insurance, a barque *on the stocks*; otherwise, the policy would not have taken effect. But these sticks were not on the stocks, never had been on the stocks, and at the time of the fire were *not ready* to be put on the stocks. The policy did not cover timbers or other materials, although intended or prepared for the barque, until actually inserted and built in the barque on the stocks. If these sticks *were* the barque, then the barque was not on the stocks, and the defendants are not liable. (*2 Duer on Ins.* 644, 646; *1 Phil. on Ins.* 285,

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847; 2 *John. Cas.* 127, 173; 8 *John.* 307.) 3. The other words inserted in the policy, as a part of the designation of the subject, lead to the same conclusion; all of them confine the risk to a particular locality, and exclude a liability for loss to matter in a different place. The subject insured was, a barque *on the stocks near the ship*, with the *privilege* of building another vessel *alongside*. This privilege would be nugatory, if the barque, wherever situate or scattered, was covered by the policy; and the provision would be absurd to speak of a vessel's being *alongside* the barque, if the barque consisted of sticks of timber scattered, as these were, all over the yard. 4. Confining the risk to this structure on the stocks, was important. If the policy had covered these scattered sticks, the premium would have been greater, and the risk would have been greater. *In fact, if the sticks had become a part of the barque on the stocks, no loss would have been sustained: the barque on the stocks was not injured.* 5. A different construction would leave it matter of the greatest uncertainty what was the subject insured; whether it was the timber for the barque, as soon as it was felled? or, only as soon as it was brought into the ship-yard? or, only as soon as work was commenced on it to fit it for the barque? or, only as soon as the materials were ready to be framed together? or, only as soon as they were entirely ready to be put into the structure on the stocks? or whether, if it was thus ready, but was not in the ship-yard, it would be covered by the policy? or, whether it would be covered if in any part of the ship-yard, or only if in a particular part of it, and in such a case, within how many feet it must be of the stocks? It is to be presumed that the parties could not have intended to enter into such a vague, doubtful and uncertain contract, when they fixed with so much care and precision the very moment of the termination of the risk. 6. The insured themselves, in their preliminary proof under oath, deliberately and carefully made, described the property injured as "*timber and lumber*," as "*462 pieces of timber*," as "*ready to be put into the frame of the barque*," and as "*alongside of the barque*." This language shows that the property destroyed constituted, not

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a part of the barque, but pieces of timber and lumber *alongside* of it, and designed *to be* put into it. The plaintiff himself evidently felt that he could not, consistently with truth, swear that *the barque* was partially or totally injured. This proves that, according to the ordinary use of language, these pieces of timber had not become a part of the barque on the stocks mentioned in this policy of insurance, any more than the moulds, for which also the insured made a claim. 7. This construction is in conformity with analogous cases. (*Sillsbury v. McCoun*, 3 *Coms.* 395; *S. C.* 6 *Hill*, 427; *Fryatt v. Sullivan Co.*, 5 *id.* 117; *Johnson v. Hurst*, 11 *Wend.* 135; *Gregory v. Stryker*, 2 *Den.* 628; *Year Book*, 5 *H.* 7, fo. 15, cited 4 *Denio*, 335, 336, *note*; *Wood's Civil Law*, 157, 159.) 8. Finally, it is in conformity with an express judicial opinion in a similar case. (*Mason & Leap v. Franklin Ins. Co.*, 12 *G. & John.* 469.)

II. The property destroyed was covered by the subsequent policy. It was "timber and building material." The insured could have recovered for its destruction under this policy. It *had been* "timber and building materials" within the meaning of that policy, and *had been* covered by that policy. When did it cease to be?

*Daniel Lord*, for the respondent. I. The subject insured was a barque in the course of being built, from the commencement of its construction; and embraced all the parts of the commenced structure, which had become so far identified with it as to have lost all value except as such parts. 1. This is the fair and natural extent of the subject described. The several parts of any machine, fitted for use in combination as such machine, and having no value except as fitted to each other in the machine, constitute the unfinished machine. The fact that they need some work to put them together, no more prevents their being the unfinished machine, than the want of additional work or parts, after some of the parts are put together. It is the unfinished machine which was insured. 2. If all the parts necessary to form a particular carriage, or watch, or steam-engine, or



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house, were collected together, and had, by their being fitted to each other, become useless for any other purpose, they would naturally and properly be described as an unfinished carriage, &c. Every particular piece would be a part of such carriage and building. 3. Supposing all such parts to have been put together, and then taken apart and separated, the parts thus separated would not cease to be described by the name of the completed article; nor would they be more entitled to its name than before they were put together. 4. The shipment to the Pacific of houses, lighthouses, steamboats, steam-engines, are well known instances of such descriptions. Whether they had been put together and then separated, or had only been fitted to be put together, could make no difference. 5. The very idea of an unfinished house or machine supposes parts not yet attached, as well as parts attached or combined and not yet completed. That additional labor is required upon the subject, may show it to be unfinished, but does not show that its parts are no part of it. 6. The keel, blocked and fitted to receive the frames, was in no higher sense a part of the barque than the frames moulded and fitted for it, and only needing to be put together. The keel was worthless without the frames, and the frames without the keel; neither was the barque; each was a part of the barque. Yet it would not be contended that the keel was not covered by the policy. So of a rudder fitted, but not hung. 7. The frames destroyed, being useless for any other purpose, would be of no value as timber or building materials, in a general sense. If they were not parts of the barque, they were nothing.

II. There are no restrictive words in the description of the subject, varying the natural meaning as above claimed. 1. The place of the subject insured, is "the ship yard on the west side of Taunton river, Somerset, Massachusetts." This makes fully certain the locality of the subject insured, and is the only needed and fair limitation of the place of risk. 2. The phrase, *on the stocks, near said ship*, was to identify the vessel whose parts were covered by the policy, from the ship actually building at the same time and the vessel which the insured secured the

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privilege to build. It was like the phrase, "building for Howes, Godfrey & Co."—an indicating of the particular vessel, and not precluding that which was fitted as a part of the vessel. 3. The "privilege to build another vessel alongside" has no bearing on the question of description. These words are introduced out of caution against the condition, that if after insurance the risk shall be increased by any means whatever, within control of the insured, the insurance shall be void. The materials and the more and less finished parts of the vessel would lie around in the ship yard, and of course the greater the quantity of them the greater the risk. But the risk was not diminished by their being put together; wood in a heap or pile is not in less risk than wood spread on the ground. 4. To contend that the frames *moulded* were not on the stocks and therefore were not parts of a barque on the stocks, is a mere begging of the question, and contrary to the fair import of the language.

III. The policy should have the broadest construction that any fair interpretation of its language can embrace. 1. Such is the well established rule of construing policies of insurance. (*Palmer v. Warren Ins. Co.*, 1 *Story's Rep.* 360; *Donnell v. Col. Ins. Co.*, 2 *Sumner's R.* 380; *Yeaton v. Fry*, 5 *Cranch*, 335.) Rigging and provisions covered by a policy on the ship, are protected while severed from the ship and on shore in usual and proper places. (*Pelly v. Roy. Exch. Assur. Co.*, 1 *Burr. R.* 341; *Brough v. Whitmore*, 4 *T. R.* 206.) On this principle, where averages are not to be paid under 5 per cent, successive averages on the same voyage may be added. (*Blackett v. Roy. Exch. Assur. Co.*, 2 *Crompt. & Jer.* 251.) This rule not only results from the great object of the contract being an indemnity in the common and popular acceptation, but because the policy is the language of the insurers. 3. The premium was on the whole sum insured from the commencement: the insurers are paid for the risk upon the whole value of all the parts of the unfinished subject from its inception.

JOHNSON, J. The question in this case is, what was the subject insured; was it the barque, as its materials should from time to time be put together in their appropriate positions in the process of its construction, or was it also such materials as were completely prepared to enter into its structure, though not united to it, and which by reason of such preparation were rendered valueless for any other use. These questions must be answered by the language of the parties, which is to be read and interpreted in its plain and ordinary sense, subject to the rules of interpretation applicable to written instruments, to ascertain the intention which they by its use have expressed. That language designates "a barque" as the subject insured, and adds to this designation certain descriptive particulars, viz. that it was on the stocks near a ship before mentioned, and that it was building for Howes, Godfrey & Co. The clause gives, further, a privilege to build another vessel alongside. The term, "a barque," standing by itself, has for its primary signification a completed vessel; but as the context shows that it could not in this case have been used by the parties in that sense, we are in the next place to see in what secondary or modified sense it has been used. To this inquiry the context affords an answer, as it discloses that the word is used, not in reference to a completed vessel, but with reference to a vessel of that class then about to be built, or then in course of actual construction; and that its construction was to be carried on at the pleasure of the insured, during the continuance of the risk, and that the insurance was to apply from time to time, not only to such part of the barque as at the inception of the risk was capable of designation by the term used, but also to such materials as from time to time should become part of the barque. It is plain that the keel of the intended vessel, when it had been blocked, and was in its place to be built upon, furnished a subject embraced by the language of the policy; it is equally plain that timbers in the rough, brought into the yard to be worked and put into the vessel, would not be covered by the policy. The inquiry then is, at what point in the process of building the vessel will such timbers cease to be

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materials for the barque, and become a part of the barque. The answer, I think, is, when they have entered into the structure which, when completed, will be a barque. This construction accords with the ordinary use of language upon such subjects. If a man had entered this ship-yard and asked to be shown the barque building for Howes, Godfrey & Co., he would have been shown the structure upon the keel, irrespective of how far the work had progressed, as being the barque; and it would have occurred to no one to point out materials not annexed to the keel, although completely prepared for that use, as being the barque. It is true that, in a technical sense, neither the keel, with the incomplete structure thereon, nor any of the materials intended for the vessel, is a barque, but in the ordinary use of language, the former would be so spoken of, and the others, though the work on them was all done, would not. It is in this ordinary sense that the language of parties is to be interpreted. I do not think it necessary to place any reliance upon the words "on the stocks near said ship," nor upon the expression of a "privilege to build another vessel alongside;" for though those words perhaps confirm the view which I have taken, indicating as they do an estimate of the amount of risk with reference to the precise locality to be occupied by the subject insured, yet the broader ground is more satisfactory that the language used in its ordinary acceptation, embraces the structure which, when completed, will be the barque, and does not embrace materials which are not become a part of the structure, by being fixed to or in it.

The decision below is objectionable in another aspect. If it be upheld, it follows that timber so far completed becomes thereupon part of the vessel, and consequently loses its character of "materials," and could not be insured under that name. It frequently happens that one man owns the keel and employs another, the ship builder, to furnish materials and finish the ship. Such materials, though completely finished, remain the property of the builder until they actually become a part of the structure of the ship. (*Johnson v. Hunt*, 11 Wend. 135; *Merritt v.*

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*Johnson*, 7 *John. R.* 473; *Andrews v. Durant*, 1 *Kern. ante*, 85.) In such a case, upon a loss by fire, the ship owner could not recover upon a policy on the "ship building" for lack of interest, nor the ship builder upon a policy on "materials," because the property has lost the character of "materials," and become a part of the "ship building." This consequence must follow, unless courts are at liberty to hold property to be properly described as "materials" and not as "parts of a ship," or as "parts of a ship" and not as "materials," according as one or the other description is necessary to give indemnity to the assured.

That the construction given accords with the law regulating the change of property when the owner and builder are different persons; that the common use of language is in harmony with it, and that the test of liability is simple and easy of application, recommend it as fit to be adopted. The case of *Mason v. Franklin Fire Ins. Co.*, (12 *Gill & John*. 468,) presented substantially the same question, and was decided in the same way by the court of appeals in Maryland. *Ellmaker v. Franklin Ins. Co.*, (5 *Barr*, 183,) is analogous, and was decided on the same principle in Pennsylvania.

The plaintiff should have been nonsuited, and the judgment must be reversed and a new trial ordered; costs to abide the event.

PARKER, J. <sup>X</sup> Although it is said that policies of insurance are to be construed liberally for the insured, (1 *Story's R.* 860; 2 *Sumner's R.* 380; 5 *Cranch*, 835,) yet where the words are not ambiguous, and the expression of the intent of the parties is full, I know of no reason why they should be excepted from the general rules of law applicable to the construction of all contracts. <sup>Y</sup> In deciding, therefore, whether the property in question is covered by the insurance, the language of the transfer is to be construed in its usual and popular sense, there being nothing to take it out of that general rule. The question to be decided is not, whether the property in question is covered by the first or the second policy. If it be excluded from the first,

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it does not necessarily follow that it is included in the second. But the question is, whether it is within the first policy, on which this action is brought; that is to say, whether the 462 sticks of timber burned were a part of the barque then building for Howes, Godfrey & Co.

The sticks were cut and ready to be framed, but they had not been framed. They did not constitute frames. They not only had never been annexed to the barque, but they were not ready to become a part of it, for they could not be annexed to the barque till they had been framed. They were sticks of timber cut to be used in the construction of the barque, but had never been so used in fact. These sticks were scattered about the ship yard, and a part of them lay on the opposite side of the ship in which the fire broke out. It is true, the proof shows that these sticks, being cut for the frame of the barque, were useless for any other purpose. But I do not see how that fact tends to show that they were part of the barque. It only shows that in getting them ready to make them a part of the barque, they had been rendered unfit for any other use. That may be a misfortune to the owners, if they are not covered by the subsequent insurance on "lumber and building materials," but it is not an argument tending to show that they were part of the barque. If it were necessary, however, to the decision of this case to decide which policy covered the sticks of timber in question, I should have no hesitation in saying that they continued to be "building materials" at the time they were destroyed. The insured party seems to have taken a similar view of this question, and to have selected appropriate words, when, in his preliminary proofs, he called the property "timber and lumber," and described it as "462 pieces of timber, ready to be put into the frame of the barque."

The property insured was a barque on the stocks building, that is to say, being built for Howes, Godfrey & Co. Now, it was only the barque on the stocks which was insured. The sticks scattered around the yard, though they had been ready to be annexed, were not on the stocks. I suppose the term "on

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the stocks" is descriptive of the whole property insured; and that it would do violence to the language of the contract to make it extend to property, only part of which was on the stocks. The description of the barque as being near the ship, and the privilege being given to build another vessel alongside of it, shows that it referred to what was on the stocks alone. Such language was not applicable to property scattered all over the yard.

Any other rule of construction than that I have adopted, would lead to great uncertainty and confusion. If the sticks became part of the vessel, before being actually incorporated in it by annexation, then when did they become so? At what point did they cease to be "building materials" and become "a barque?" When the timber was cut in the forest? It may have been so selected and cut as to be fit for no other vessel. Or was it when the sticks were brought to the yard? or when the work was commenced on them to fit them for the barque? or when they were ready to be framed? or when they were framed and ready to be annexed? If all this would make the sticks a barque, which I deny, it is one step more than had been taken in this case, for the sticks had not been framed. It is apparent that as soon as we leave the safe rule, which requires actual annexation, there is no point of preparation at which the thing changes its entire character. If it were the building of a house instead of a ship, none of the materials furnished would lose their character as personal property and become part of the realty, until actually annexed. (*Ferard on Fix. 9, note a.*) "*Ubi eadem ratio, ibi eadem jus.*"

If we are at liberty to look beyond the naked words of this contract, it is plain that great injustice would be done by adopting the construction claimed by the plaintiff. The defendant's counsel offered to show that the premium would have been greater, if the scattered sticks in question had been included in the policy. And that the risk is greater for such property, can hardly be doubted. In this case, the fact cannot be overlooked, that if the sticks had become part of the barque on the stocks, no loss

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*Forman against Marsh.*

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would have been sustained; for the barque on the stocks was not injured.

The question presented is not at all like the cases cited, where rigging and provisions covered by a policy on a ship are protected, while severed from the ship and on shore in their usual and proper places. (1 *Burr.* 341; 4 *Tenn. R.* 210.) I concede that if the sticks had once been annexed, and had thus been made part of the vessel, they would not lose their character while severed for a temporary purpose. They would still, in that case, be part of the barque. Whether in such case they would have been excluded on the ground that they were not "on the stocks," is another question, and one not necessary to be determined in this suit.

I cannot distinguish this case from that of *Mason & Leap v. Franklin Ins. Co.*, (12 *Gill & John.* 469;) and I think the judgment of the superior court should be reversed and a new trial awarded.

Judgment accordingly.

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FORMAN and another, adm'rs, *against* MARSH and others.

The object of the statute, (2 *R. S.* 195, § 180,) which declares that the proceeds of an infant's lands sold by order of the court of chancery, shall be deemed real estate, was to preserve during his minority the character of the property in reference to the statutes regulating descents and distributions.

The character impressed upon the proceeds by the statute ceases on the infant's attaining his majority and obtaining possession thereof.

Accordingly, where real estate of an infant was sold under the direction of the court, and a bond and mortgage thereon were executed to his special guardian to secure the purchase money; and the infant, after his majority, settled the guardian's account touching the trust and discharged him therefrom, took from him individually a receipt for the bond and mortgage and constituted him his attorney to collect and reinvest the amount secured thereby in his discretion, and before payment of any part of the amount died intestate; *Held*, that the bond and mortgage and the moneys secured thereby were personal estate, and to be distributed as such.



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*Forman against Marsh.*

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**APPEAL** from a judgment of the supreme court sitting in the fifth district.

In 1835, certain real estate situate in the county of Onondaga, owned by Charles W. Forman, an infant, and which descended to him from his father, was sold by the direction and order of the court of chancery upon proceedings for that purpose duly instituted and conducted. Laban Haskins was the special guardian of the infant in this proceeding, and Richard Adams was the purchaser of the real estate. To secure the purchase money, which was \$8000, Adams executed to Haskins as such special guardian his bond and a mortgage on the same real estate, conditioned for the payment of that sum in twelve years from the 1st day of April, 1835, and interest thereon annually. Charles W. Forman attained the age of twenty-one years on the 20th of September, 1847; and on the first of October ensuing, no part of the principal of the bond and mortgage having been paid, the following transactions were had between him and the guardian: Haskins presented his account as guardian, which included the interest received by him from year to year on the bond and mortgage and the disposition thereof, and showed him indebted to his ward in the sum of \$310.38. This account was examined by Forman and agreed to as being correct, and he then executed to Haskins an instrument by which it was recited that he had examined the account and found it correct; and in which he acknowledged that he had received of Haskins the sum of \$310.38, in full of the balance of the account as stated, and also the bond and mortgage made by Adams, upon which the whole amount of principal and some interest were due, in full satisfaction, payment and discharge of Haskins, and of his trust as guardian, and of all demands against him touching the guardianship or management of his estate. At the same time Forman executed to Haskins a power of attorney, in which this settlement was recited, and by which he constituted him his agent and attorney, to loan the sum of \$310.38 and collect the interest thereon, and also to collect the interest on the bond and mortgage and to reinvest the same; and thereby Haskins was also authorized to collect the principal upon

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*Forman against Marsh.*

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the bond and mortgage when he (Haskins) deemed it advisable so to do, and to reinvest such principal in such manner and upon such terms as he should deem most advantageous, and in all respects to manage the same as should be in his (Haskins's) judgment for the interest of Forman, the latter agreeing to pay him a reasonable compensation for his services. Simultaneously with the execution of the acquittance and power of attorney to Haskins, the latter executed to Forman a receipt, by which he acknowledged the receipt from him of the \$310.38, and of the bond and mortgage mentioned in the power of attorney to manage and dispose of pursuant to the directions and authority therein contained. On this occasion the bond and mortgage were present; but Forman did not actually receive from Haskins the sum of \$310.38, and no assignment of the bond and mortgage was executed by him to Forman; they were left with and remained in the actual possession of Haskins until the death of Forman.

In March, 1848, Charles W. Forman died intestate, and the plaintiffs in this suit were appointed his administrators. He died without having married, and leaving him surviving relations on the part of his father and also on the part of his mother. The principal of the bond and mortgage was unpaid at the time of his death. The administrators commenced the suit, claiming that the bond and mortgage and the moneys secured thereby were to be regarded as real estate, and should be disposed of according to the statute of descents; some of the defendants insisted that the same were personal estate, and to be disposed of according to the statute of distributions. The cause was heard at a special term of the supreme court, before Justice Mason, who was of the opinion that the bond and mortgage were to be regarded as real estate, and judgment was rendered accordingly. (*See 7 Barb. 215.*) From this judgment some of the defendants appealed. The cause was heard on appeal by the supreme court sitting at general term in the 5th district, and the judgment at special term was reversed, and judgment rendered declaring that the bond and mortgage, and all moneys unpaid thereon at the death

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of Charles W. Forman, were to be deemed personal estate, and distributed as such. The plaintiffs appealed to this court.

*George F. Comstock*, for the appellants.

*George Underwood*, for the respondents.

EDWARDS, J. The question is presented, whether, at the time of the death of Charles W. Forman, the bond and mortgage in controversy were real estate descendible to his heirs, or personal estate distributable amongst his next of kin.

The right of the guardian to change the nature of the estate of his ward was acknowledged by the court of chancery at an early period, but it was restricted by two qualifications: First, that the change should be for the manifest advantage of the infant; and, second, that the right of succession to the property, in case of the death of the infant, should not be changed. (*Earl of Winchelsea v. Norcliffe*, 1 Vern. 435, and note 3; *Witter v. Witter*, 3 P. Wms. 101, and note 1; *Peirson v. Shore*, 1 Atk. 480; *Oxenden v. Lord Compton*, 2 Ves. jr. 69; *S. C.*, Bro. Ch. C. 231; *Ashburton v. Ashburton*, 6 Ves. 6; *Ware v. Polhill*, 11 id. 257, 278; *Ex parte Philips*, 19 id. 122, 123.) In carrying out this principle it has been the practice of the court, in making orders for the sale of infants' estates, to insert a provision declaring that their quality shall be preserved. This has been done not upon the ground that presumptive heirs or distributees have any right to, or interest in the estate, but because courts of equity have thought that justice required that even their mere possibilities should be protected. (2 *Story's Eq. Jur.* § 1357.) There is also another reason founded upon the common law right of an infant to dispose of his personal estate, by will, at an earlier age than twenty-one years. (1 Vern. 435.)

In the year 1815, the legislature of this state passed an act providing, that in case of a sale by a guardian of the real estate of an infant, the proceeds of such real estate should be con-

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*Forman against Marsh.*

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sidered relative to the statute of descents and distributions, and for every other purpose, as if the real estate had not been sold. (*Laws* 1815, *ch.* 106, § 5, *p.* 104.) And the revised statutes declare that no sale of the real estate of an infant, made as therein provided, shall give to such infant any other or greater estate in the proceeds of such sale, than he had in the estate so sold, but the said proceeds shall be deemed real estate of the same nature as the property sold. (2 *R.S.* 195, § 180.) These statutes are merely enactments of the chancery rule as applicable to sales of the real estate of infants; and the impress of realty, which was formerly given by the court of chancery, is now given by the statute. The object of the statute undoubtedly is, as it was of the chancery rule, to deprive the guardian of the power to do an act which would affect the rights of the representatives of the infant, or which would give to the infant a power of testamentary disposition which he did not before possess. These are the only reasons for the rule which have ever been, or which can now be suggested. But it was never supposed, under the old chancery rule, that the real estate of an infant when converted into personal, or the personal estate when converted into real, retained its fictitious impression after the infant had attained the age of twenty-one years, and after the estate had come into his possession and under his control. Neither, in my judgment, should such an effect be given to the sale of an infant's estate when made under the statute.

The principle contended for by the counsel for the plaintiffs is, that by the operation of the statute the bond and mortgage, although in fact personal estate, had become real, and that the quality which has thus been given to them cannot be changed, except by an actual conversion into personal estate, or by an act which, in equity, is considered equivalent to a conversion. The necessary effect of such a construction of the statute would be to introduce an anomalous estate into the law, and, as I think, it ought not to be adopted without good reason. It will be remembered that in this case the infant, after he arrived at the age of twenty-one years, came into the possession of the

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bond and mortgage, executed an instrument in which he acknowledged the receipt of them, and discharged his guardian from all claims against him in that capacity. The relation of guardian and ward had thus become terminated. All the ends contemplated by the statute had been accomplished. The course of descent had not been changed by any act of the guardian; and the infant had arrived at that age when the law regards him as competent to assume the entire control of his property. At this time the bond and mortgage were personal property in fact, and I think that they should be so regarded in law.

I agree with the counsel for the plaintiff, that this case is not to be governed by the rules applicable to equitable conversion. The bond and mortgage became impressed with the quality of real estate by the operation of the statute, and not upon any principle of equity. But the principles of equitable conversion may be referred to with great advantage by way of analogy and illustration. It is a general rule that where equity impresses a different quality upon property from that which it has in fact, such impression ceases whenever the possession of the estate, and the right to it, in each quality, meet in the same person; that is, when there is no other person than the one who has the actual possession, who has an equitable interest in retaining the fictitious character of the estate. Thus when real uses have been impressed upon personal property, and the personal fund and the uses come together in the same person, the uses are considered as discharged and merged; for there is no person to call for their application. (*Pultney v. Darlington*, 1 Bro. C. C. 228; *Wheldale v. Patridge*, 8 Ves. 228; *Rashleigh v. Master*, 1 Ves. jun. 201; *Leigh & Dalzell on Eq. Cas.* 174.) So where, by virtue of a contract of sale, there has been an equitable conversion of personal into real estate, and the property comes into the possession of a person who is entitled to it both as heir and executor, it immediately becomes in equity, what it is in fact, that is, personal property. It is discharged from the fictitious impression which had been given to it. If the impression of realty which was given to the property in question had

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been given by the application of equitable principles; as would have been the case if there had been no statute on the subject, then, as soon as the property was received by the person who alone was interested in it, after he became of full age and was competent to receive it, it would be considered both at law and in equity what it was in fact, that is, personal estate. The guardian could no longer affect the rights of those who might be interested in the estate, and no person whatever would have any right, which the law would acknowledge, to insist that one quality should be impressed on the estate rather than another. What reason then can be given why, in this case, an estate, which, under ordinary circumstances would be regarded as personal, should, in the hands of an absolute and unqualified owner, who was competent to receive and hold it, have an entirely different quality impressed upon it, and should have that quality so inexorably fixed that nothing but a sale, or at least a contract of sale, could make it in law what it was in fact? I think that such an effect cannot be given to the statute. There is nothing in its words or in its spirit which requires such a construction.

But it is said, and it was so held at the special term, that even if the principle contended for by the plaintiffs, that, in order to remove the impression of realty given to the infant's estate, there must be either an actual or an equitable conversion of it into personal property, be untenable, still that the estate will retain the real quality which has been impressed upon it, unless the infant, after he arrives at full age, does some act indicating an intention to change such quality. This view seems to have been suggested by the doctrine of equitable conversion, or, perhaps it may be more properly said, it is founded upon the misapprehension of a rule applicable to personal property impressed with real uses. When the property thus impressed is in the hands of a third person, its character cannot be changed, without some act on the part of the person beneficially interested, indicating an intention to that effect. But when the property is "at home," as it is expressed, that is, when the fund and the uses are united in the same person, no election is necessary. (*Pult-*

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ney v. Darlington, 1 Bro. C. C. 228; 7 Bro. P. C. 580; Rashleigh v. Master, 1 Ves. jun. 201; Wheldale v. Patridge, 8 id. 227.) In the present case the absolute property was in the possession of the party entitled to it, and, according to the rule of equitable conversion, if it were applicable, the real character which had been impressed upon it was gone.

But even if it had been necessary for the owner of the property after it came into his possession to do some act, indicative of his intention that it should be considered as personal estate, I think that sufficient was done in this case; for, after the bond and mortgage had been received by Forman, he delivered them to his agent in the condition in which they were, that is, as personal property, and authorized him to collect the money due upon them and reinvest it in any way that he might deem safe. Here was as explicit a declaration of intention as could be made by acts, that the property should continue to be what it was in fact, that is, personal estate.

The judgment should be affirmed.

RUGGLES, J. The court of chancery has no inherent original jurisdiction to order the sale of an infant's real estate. (6 *Hill*, 416.) The authority to direct such sale was first conferred by statute in 1814. This statute was amended in 1815; but for the purpose of determining the question arising in the present case, it will be sufficient to refer only to the provisions of the revised statutes of 1830 relating to that subject, on the construction of which the question depends. Section 175 (2 *R. S.* 195) authorizes that court to direct a sale of infant's lands when necessary for the maintenance or education of the infant, or when his interest requires or will be substantially promoted by it. Section 180 directs "that no sale made as aforesaid of the real estate of any infant, shall give to such infant any other or greater interest or estate in the proceeds, than he had in the estate so sold; but the said proceeds shall be deemed real estate of the same nature as the property sold." The first branch of this section was intended to protect the interests of those

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*Forman against Marsh.*

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who might have future estates, vested or contingent, in the land ; and has no application to the present case. The latter branch is the part on which the question in this case arises ; and that question is, when shall the proceeds of the sale cease to possess the artificial character of real estate impressed upon them by the statute.

The duration of this artificial character is not limited by any express terms contained in the clause which creates it. If that clause is to be literally construed, the personal fund must retain the character of real estate as long as it exists. On that construction, if the bond and mortgage in question had been sold by Charles W. Forman after he attained the age of twenty-one years, it would nevertheless have retained its statutory character of real estate. The statute does not declare that its character may be changed by the act or election of its owner after he arrives at full age ; and the idea that his act or election is necessary, or would be effectual for that purpose, is neither expressed nor implied by the language of the enactment. And yet it is not and cannot be contended that its statutory character of real estate is perpetual and immutable. The question then recurs, at what time or on what event is it changed, and when is the fund to assume its natural character of personal estate ?

The true answer to the question is, that the proceeds of the sale become divested of their artificial character of real estate as soon as the purposes of the statute in impressing that character upon them are accomplished ; and this is when the infant becomes capable of disposing of his own property. The design of the statute was to take care of the infant's interests during his legal incapacity, and no longer. The infant is a ward of the court only during that period. The special guardian is appointed only for that time. The chancellor's power and authority cease with the infant's disability, except for the purpose of taking the guardian's final account ; and that power is part of his general jurisdiction, independent of the statute. The trust created by the act, continues only during the infancy ; and it would be unreasonable to suppose that the legislature intended that



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the fictitious character imposed on the fund, for the purposes of the trust, should remain attached to it after the trust had expired. The statute, by declaring that the proceeds of the sale shall be deemed real estate of the same nature and quality as the property sold, prevents any change in the law of its devolution in case of the infant's death; and the fund, therefore, in such case, goes to his heirs and not to his personal representatives, as it otherwise would. The object of the provision, however, was not to favor the heir against the next of kin; because as between them there is no equity during the life of the owner. But the design was to take away from both classes of representatives all temptation to tamper with the infant's interests, by promoting or opposing a sale, with a view to their own expectations of succeeding to his property in case of his death during the period of his disability to dispose of the land. This reason for the provision ceases with the infant's disability. To prolong the application of the statute to a fund like that in question, beyond that period, would be not only useless, but mischievous. It would give rise to great uncertainty and litigation upon the question how long its statutory character and quality remained, and what acts of the party or other circumstances were necessary or sufficient to give it its natural character and attributes of personal estate.

I am of opinion, that when Charles W. Forman became twenty-one years of age, the bond and mortgage in question became personal property in law, as they were in fact, and that upon his death they went to his next of kin and not to his heirs at law, and that the judgment of the supreme court in general term ought to be affirmed.

Judgment accordingly.

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Hynds *against* Schenectady Co. Mutual Ins. Co.

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HYNDS and another *against* THE SCHENECTADY COUNTY  
MUTUAL INSURANCE COMPANY.

A condition in a policy of insurance upon a building, which prohibits its being appropriated, applied or used for the purpose of storing or keeping therein certain articles denominated hazardous, is not violated by a mere temporary or casual deposit of such articles in the building.

But if the building or any part thereof is used for the purpose either of storing or of keeping therein prohibited articles, it is a violation of the condition.

ACTION upon a policy of insurance dated the 10th of June, 1848, by which the defendant insured the plaintiffs against loss and damage by fire to the amount of \$1500 on their flouring mill and machinery, and \$500 on their carding machine and machinery, situate in the town of Seward, Schoharie county. The cause was tried in October, 1850, at the Schoharie county circuit, before Mr. Justice Wright and a jury. The policy of insurance above mentioned was read in evidence. It contained a provision as follows: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making and during the time this policy would otherwise continue in force, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, or specified in the memorandum of special rates in the terms and conditions annexed to this policy, *or for the purpose* either of storing or of keeping therein any of the articles, goods or merchandise in the same terms and conditions denominated hazardous, or included in the memorandum of special rates, except as herein specially provided for, or hereafter agreed to by the company in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force or effect." The policy also contained a provision, that it was made and

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Hynds *against* Schenectady Co. Mutual Ins. Co.

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accepted in reference to the terms and conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties in all cases. By the conditions annexed to the policy, an applicant for the insurance of a building was required to state, among other things, "how it was occupied; whether as a private dwelling or otherwise, and particularly whether any manufactory was carried on within or about the premises, and the occupation of contiguous buildings;" and in case of loss, the insured, in his account thereof to be furnished to the company, was required to state "in what general manner (as to trade, manufactory, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss." It was further provided by these conditions, "that any misrepresentation or concealment, or fraud, or false swearing in any statement or affidavit in relation to the loss or damage, should forfeit all claim by virtue of the policy, and be a bar to any remedy on the same." Among the articles denominated hazardous, in and by the terms annexed to the policy, was flax. In the application, as in the policy, the property was described as a flouring mill and machinery, and carding machine for wool and machinery; the carding machine building being thirty feet square. It was not mentioned in the application or policy that *flax* was stored or kept upon the premises, or that there was any flax in either building. It was proved that on the 12th of June, 1848, a fire originated in the carding machine building, which consumed it and its contents, and the flouring mill and its machinery. It appeared that prior to the 27th of May, 1848, the carding machine building had been used for carrying on the business of dressing flax; that between this date and the 10th of June, when the policy was executed, this business was discontinued, the flax machinery taken down, and the building furnished and appropriated for a carding machine. When the change was made, the refuse flax and tow were removed from the building; but some unbroken flax, being in bulk about two and one half feet high, three feet wide and of the length of the flax, was placed in the

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*Hynds against Schenectady Co. Mutual Ins. Co.*

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corner room of the building, and was there when the policy was issued, and remained there till the fire occurred. In the statement of loss furnished the company by the plaintiffs, the carding machine building was described, and the use to which each portion of it was applied in carding and dyeing wool, and fulling and dressing cloth, and the machinery therein for this purpose at the time of the fire, were stated, but no mention was made of said *flax*, or that the building was used or occupied for *keeping* or storing *flax*, or that it contained any *flax* at or prior to the fire. In verifying this statement, the plaintiffs made affidavit that this was a true statement of how and for what each distinct room in the building was used or occupied at the time of the loss.

At the close of the case, the counsel for the defendant moved the court to nonsuit the plaintiffs, on the grounds, (1,) that the application did not truly state how or in what manner the carding machine building and the several parts thereof were occupied; (2,) that the application omitted to state that *flax* was kept or stored in the basement story thereof; (3,) that the plaintiffs, in their proof of loss, untruly stated the general manner in which the building and its several parts were occupied at the time of the loss, and concealed the fact that *flax* was kept or stored in the basement room; and (4,) that in such proofs the plaintiffs omitted to state that, at the time of the loss, *flax* was stored or kept in the building. The court refused to nonsuit the plaintiffs, and the defendant's counsel excepted.

The counsel for the defendants requested the court to charge the jury, 1. That if they believed that there was *flax* kept in the lower room of the carding machine building at the time of the fire, the policy would be of no effect. The court refused to charge upon this proposition other than as is hereafter stated; to which refusal the defendant's counsel excepted. 2. That if the jury should believe that there was *flax* in the lower story of the carding machine building for safe keeping and not for the purpose of consumption, or in the usual course of business for which the building was occupied, the plaintiffs were not entitled to recover. The court refused to charge upon this proposition, other than as

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is hereafter stated; to which refusal the defendant's counsel excepted. 8. That if the jury believed that the fire originated in the flax or tow in the lower room of the carding machine building, the plaintiffs are not entitled to recover. The court refused so to charge, and the defendant's counsel excepted.

The court then, amongst other things, charged the jury, that the policy of insurance was, in effect, a contract between the parties. In it there is a warranty on the part of the plaintiffs, that after the making and during the time the policy would otherwise continue in force, the building insured should not be appropriated, applied or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, as specified in the terms annexed to the policy, or for the purpose of either storing or keeping therein any of the articles, goods or merchandise in the terms denominated hazardous or extra-hazardous. That the violation of this warranty rendered the policy of no force or effect, whilst the building was so appropriated, applied or used. That if, at the time the fire occurred, the evidence satisfies the jury that the building was appropriated, applied or used for the storage of flax, the policy was of no force, and the plaintiff should not recover; but if the building was not devoted to or used for that purpose, and the small pile of undressed flax, said to have been in the lower room of the carding machine building, was there but temporarily, and with no intention of having it regularly stored or kept there, then the policy would not be avoided. To the last branch of this paragraph of the charge the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiffs for \$2289.20, upon which judgment was entered. The defendant made a bill of exceptions, and on appeal the judgment was affirmed by the supreme court sitting in the third district, at general term. (*See 16 Barb. 119.*) The defendant appealed to this court.

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*P. Potter*, for the appellant. I. The learned justice erred in refusing to nonsuit the plaintiffs as requested. The omission of the plaintiffs to disclose, in their application for insurance, that there was flax piled up in one of the rooms of the carding machine building, is a *concealment*, and fatal to their right to recover upon the policy. (*Wilson v. The Herkimer Co. Mutual Ins. Co.*, 2 *Selden*, 59; *Gates v. The Madison Co. Mutual Ins. Co.*, 2 *Comst.* 48, 51.) 1. "The concealment of a material fact is fatal to the policy, whether it occur through fraud, accident or honest mistake." (1 *Phil. on Ins.* §§ 531 to 534, 537. 3 *Kent's Com.* 6th ed. 282, 283.) 2. The materiality of the fact was entirely clear, and was not a fact for the jury. 3. The question is whether the fact was material *in the estimation of the underwriter*; not whether it would be so in the estimation of others. 4. The parties made the fact material by the terms of their agreement. (2 *Comst.* 49, 52; 5 *Hill*, 188; 2 *Denia*, 75, 83. *See brief of Hill, counsel, sustained by this court*, 2 *Seld.* 57. 5 *Hill*, 193.)

II. The learned judge erred in not charging the jury, as requested by the defendant's counsel, that if they believed that there was flax *kept* in the lower room of the carding machine building at the time of the fire, the policy would be of no effect, and in charging as he did. The case of *O'Neil v. The Buffalo Fire and Marine Ins. Co.*, (3 *Comst.* 122,) is probably the case which was in the mind of the judge. But this case settles no such doctrine as that contained in the charge. Again, the word *storing* is the only prohibitory word used in the policy under consideration in that case. In the case now before the court, the policy prohibits the party from *keeping* the forbidden article, either temporarily or permanently. The flax in this case was not necessarily required by, nor was it introduced for any purpose connected with the legitimate occupation of the building. If the party had no right to keep flax in the building, the intention with which it was kept is not important. (*Fowler v. Aetna Ins. Co.*, 6 *Cowen*, 673; 1 *Phil. on Ins.* 351, 354; 5 *Hill*, 193.)

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Hynds *against* Schenectady Co. Mutual Ins. Co.

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III. The learned judge erred in refusing to charge the jury, that if they should believe that there was flax in the lower story of the carding machine building for safe keeping, and not for the purpose of consumption, nor in the usual course of business for which the buildings were occupied, the plaintiffs were not entitled to recover. (3 *Comst.* 127 ; *O'Neil v. Buffalo Fire Ins. Co.*, 2 *Hall*, 226.) If the case of *Shaw v. Robberds*, (6 *Adol. & E.* 75,) cited by Justice Harris in the court below, goes to the extent supposed by that learned judge, it is in conflict with the cases in our own courts. That it is not intended to be in conflict, will be seen by the fact that it cites the case in 1 *Mood. & M.* 90, and no other authority, for the principle it lays down. This latter case is not in conflict with our authorities nor with the principle we contend for.

*N. Hill, Jr.*, for the respondents. I. The condition as to the keeping or storing of hazardous articles is not violated, except by acts which fairly show a *habitual use of the building* or some part of it for that *purpose*. 1. The condition applies to the *general purposes* for which the building or some part of it is used or occupied ; not to *every* deposit of hazardous goods in it. (*Dobson v. Sotheby*, 22 *Eng. Com. L. R.* 260 ; *Moore v. Pro. Ins. Co.* 29 *Maine R.* 97. See cases cited under next subdivision.) 2. An act of *temporary or casual* deposit, not repeated so as to show a *user or habit*, nor sufficient to mark one of the *purposes* for which the building is *occupied*, is no breach. (*Moore v. Pro. Ins. Co.*, 29 *Maine R.* 97 ; 2 *Greenl. Ev.* § 408, 3d ed. ; *Dobson v. Sotheby*, 22 *Eng. Com. L. R.* 260 ; *Shaw v. Robberds*, 88 *id.* 12, 15, 16 ; *O'Neil v. B. I. Co.*, 3 *Comst.* 122, 126, 7 ; *Gates v. Mad. Co. M. Ins. Co.*, 1 *Seld.* 469, 479 ; *N. Y. Fire Ins. Co. v. Langdon*, 6 *Wend.* 623 ; see *Potter v. Bank of Ithaca*, 5 *Hill*, 490 ; *Suydam v. Morris &c. id.* 491, note (a) ; *Sacket's Har. B. v. Pres. &c.* 11 *Barb.* 213.) 3. The cases relating to articles introduced into the building under circumstances which show that storage or safe keeping was not a *leading purpose*, stand

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on this principle. (*Moore v. Pro. Ins. Co.*, 29 *Maine R.* 97; *Dobson v. Sotheby*, 22 *Eng. Com. L. R.* 260; *O'Neil v. B. Ins. Co.*, 3 *Comst.* 126; *Gates v. Mad. Co. Mu. Ins. Co.*, 1 *Sold.* 469, 477. *See the other cases cited under subd. 2, supra.*)

4. The rule is the same, where the article is not deposited by the assured or his agent, but is left in the building without his knowledge by a *trespasser*. 5. And so, if the article is in the building at the moment of insurance, and the fire occurs before the premises are used, or a removal is possible. 6. In these, and the like cases, the insured cannot be said to have *appropriated the building for the purpose of storing or keeping the article, after making the policy*. (*Tice v. Reid*, 12 *Law Journal*, 299, *C. P. new series.*) 7. The construction claimed by the defendants would render the following acts a forfeiture, though done but once, which clearly is not the intent *expressed* by the condition. (1.) Bringing a pound of flax into a building in the evening, and leaving it till morning. (2.) So placing it in a desk for safety, while the depositor is transacting other business in the building. (3.) So if the building insured is a farmer's dwelling house, and a small quantity of flax is in it at the time of the fire. 8. The condition being the language of the underwriters, and involving a forfeiture, is not to be extended. If the defendants meant to prohibit *all* deposits of flax indiscriminately, they should have *said so plainly*. (22 *Eng. Com. L.* 260, 1, *per Ld. Tenterden*; *Catlin v. Spr. F. Ins. Co.*, 1 *Sumn.* 484; 1 *Arnould on Ins.* 588, § 215; *Palmer v. W. Ins. Co.*, 1 *Story's R.* 364; *Blackett v. R. E.*, 2 *Crompt. & Jer.* 251.)

II. The question, whether the plaintiffs had appropriated or applied the building for the purpose of storing or keeping flax, after the making of the policy, was properly submitted to the jury. 1. The policy was dated on *Saturday* the 10th of June, at Schenectady, and the fire occurred on *Monday morning*, the 12th of the same month. (*See 5 Hill*, 104, 6, *per Bronson, J.*) 2. There was no evidence that the plaintiffs used the building for any purpose, *after making the policy, and during*



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*its continuance.* 3. The judge was not bound to charge as requested *without qualification*, and his refusal was therefore proper. (See point I, and its subdivisions; *Cowen & Hill's Notes*, 790; *Doughty v. Hope*, 3 *Denio*, 594; 1 *Kern*. 61, 79; 4. If the charge was *ambiguous*, or some word was *omitted*, or an *inaccurate* one used, the judge's attention should have been called to it at the time. (*Cowen & Hill's Notes*, 790; *Hall v. Mannin*, 3 *Bligh's R.* 22, *N. S.*; *Gardner v. Pickett*, 19 *Wend.* 186; *Reab v. McAllister*, 8 *id.* 112; *Sellick v. S. H. T. Co.*, 18 *Conn. R.* 460.)

III. The questions as to *concealment* in the application were properly disposed of on the trial, and no exception was taken to this part of the charge. 1. The omission to remove the flax not being a breach of the *condition*, the question of *concealment* was for the jury. (2 *Greenl. Ev.* §§ 397, 8, 408; *Tyler v. Aetna Ins. Co.*, 12 *Wend.* 507; *Grant v. Howard*, 5 *Hill*, 10; *Jefferson Ins. Co. v. Cotheal*, 7 *Wend.* 72, 79; *Masters v. Madison Co. Mu. Ins. Co.*, 11 *Barb.* 624.) 2. No question was put by the application calling for disclosure as to the flax, nor were the plaintiffs apprised that this was desired. (*Gates v. Madison Co. Ins. Co.*, 1 *Seld.* 469, 474, 5; *Masters v. Mad. Co. Mu. Ins. Co.*, 11 *Barb.* 624.)

GARDINER, Ch. J. The language of the condition of the policy in question, so far as it is applicable to the case before us, is "that in case the premises insured shall be *appropriated, applied to or used for the purpose*, either of *storing or keeping* therein any of the articles, goods, &c., denominated hazardous, &c., then, from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall be of no force or effect." It is not enough, according to this phraseology, that hazardous articles are upon the premises. They must be there for the purpose of being stored or kept; and the premises must be appropriately applied or used to effect that purpose. This is the definition that has been settled by repeated decisions in reference to the word "storing;" and there is no reason why it should not be applied

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to "keeping," a word of more extensive signification undoubtedly, but which, in this connection, seems to demand a continued occupation of the whole, or a part of the premises insured, in pursuance of a design for that specified purpose. Thus, the storing of gunpowder, implies the user of the premises for that purpose, and such a condition would not be violated by keeping that article for sale at retail. But such a "keeping" would be a breach of the condition of this policy, because it would require a continued user of some part of the premises to effect that purpose. But if the insured, on his return from hunting, should leave his flask, containing powder, in a desk in a building covered by the policy, for an hour, or a day, this would not be within the prohibition, for the act would not involve the notion of the appropriation, application or user of the premises for the purpose of storing, or keeping gunpowder. The counsel for the appellant was probably right in his suggestion, that the word keeping was introduced into these policies after the decisions in 1 *Hall*, 226, and other cases which restricted the term "storing" to its ordinary commercial meaning. The alteration was designed to reach a class of cases where hazardous goods were kept for retail, or other purposes, which presupposed a continued deposit, and which were excluded from the condition by the construction given by the courts to the policies in the cases mentioned. But it is not to be presumed that the company in this case intended by a formal condition to prohibit the insured from bringing a match upon the premises for the purpose of lighting a fire, or a bottle of oil to apply to the machinery, although both might remain in the building for a brief period, and although it might be said that in the broadest sense of the term that both were *kept* upon the premises, while they remained there. There is a manifest distinction between a deposit of hazardous goods, and a deposit for the purpose of keeping them. A distinction which is recognized by the terms of the condition, and which is necessary to prevent the policy from being altogether worthless as an indemnity, if not a mere imposition on the insured.

This is the only point presented of any importance. It was

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raised on the motion to nonsuit and in the request to the judge for specific instructions to the jury. The charge was in conformity to the views above suggested. The judgment of the supreme court should be affirmed.

RUGGLES, DENIO, JOHNSON and EDWARDS, Js., concurred in the foregoing opinion.

SELDEN, PARKER and ALLEN, were in favor of reversing the judgment.

Judgment affirmed.

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THE PEOPLE, *ex rel.* Mygatt, *against* THE SUPERVISORS OF  
CHENANGO COUNTY.

Assessors have not jurisdiction to assess a person for his personal estate, where he is not a resident of their town at the time when the assessment is made.

One assessor cannot make the assessment; it must be made by all the assessors, or by a majority of them upon a meeting of all.

And where one of the assessors, while engaged in ascertaining the names of the taxable inhabitants and the taxable property, called in May upon a person then a resident of the town, and made an entry of his name and the value of his taxable personal estate at \$10,000 and so informed him, and such person soon thereafter removed to another county; and afterwards and in July the assessors prepared and completed the assessment roll, in which he was assessed for personal property to the value of \$10,000; *Held*, that the assessment was not made till July, and that the assessors had no jurisdiction to make it.

Where, on such an assessment, the board of supervisors of the county impose a tax upon the party, which is collected by a seizure and sale of his property upon their warrant issued to the collector, the assessors are liable to him in an action for the amount of the tax and expenses of collection.

But, in such a case, the supervisors cannot be compelled by writ of mandamus to audit and allow to the person thus wrongfully assessed, the amount of the tax collected from him, and direct it to be levied upon the town or county.

As a general rule, the writ of mandamus will not lie where the party aggrieved has an ample remedy by an action at law.

This writ lies to give effect only to a clear legal right.

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**APPEAL** from a judgment of the supreme court, directing a peremptory mandamus to issue against the supervisors of Chenango county.

In November, 1848, an alternative mandamus was issued out of the supreme court, on the relation of William Mygatt, directed to the supervisors of the county of Chenango. The writ recited that it was represented that, in the summer of 1846, Mygatt, then being a resident and inhabitant of the town of Oswego in the county of Oswego, was assessed by the assessors of the town of Oxford in the county of Chenango, and subjected to a tax of \$100 for his personal property for that year; that his personal property was seized and sold by the collector of taxes of Oxford to the amount of \$108.29, for the satisfaction of the tax and the fees of collecting the same; that he was assessed and paid taxes, on his personal property for the year 1846, in the town of Oswego; that he had applied to the supervisors of Chenango county to audit and allow said sum of \$108.29, and assess the same on the county of Chenango, or the town of Oxford, which they refused to do, and commanded the supervisors to audit and allow the claim of Mygatt to \$108.29, as a just charge or claim against the town of Oxford or the county of Chenango, and direct it to be collected by tax accordingly and paid to him, or, in default thereof, that they make return to the court why they had not done so, at the ensuing January term. There was a return and an amended return made by the supervisors to the writ. By these the supervisors alleged, as cause for not complying with the command of the writ, the following facts: that the assessors of the town of Oxford for the year 1846 divided it into three assessment districts, and that John Y. Washburn, one of their number, on the 22d of May, in that year, while engaged as such assessor, in ascertaining by diligent inquiry the names of the taxable inhabitants and the taxable property, real and personal, in one of the districts, called at the dwelling house of Mygatt in said district, where he and his family were then residing, and informed him that he had come to make an assessment of his real and personal property. Mygatt at first replied he had nothing

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to say on the subject ; but after the assessor had assessed his real estate and requested information concerning his personal property, he stated that he had intended before that time to remove, and was about to remove to Oswego, in the county of Oswego, and objected to being assessed for his personal property in Oxford. The assessor then said to him that he was assessing that part of his district, and as he found him residing there, and an inhabitant thereof, it was his duty as assessor to assess him ; and thereupon the assessor entered and assessed the personal property of Mygatt at \$10,000, and so informed him. To this Mygatt made no reply, but during the conversation he stated that his personal property had theretofore been assessed too high, and that if it should be assessed at \$10,000 he would be satisfied. Soon after this and during May, 1846, Mygatt removed from Oxford to Oswego, and resided there until 1847. That subsequently, and after the removal of Mygatt to Oswego, and in July, 1846, the assessors of Oxford prepared an assessment roll for the town, and completed the same prior to the first day of August, 1846. In this the name of Mygatt was inserted by the assessors, and in the proper columns opposite thereto they inserted \$2800 as the value of his land, and \$10,000 as the value of his personal property. That a copy of this assessment roll was made and left with one of the assessors, and they caused notice to be given pursuant to §§ 19 and 20 of article 2, title 2, chapter 13, part 1st of the revised statutes ; that the assessors met pursuant to the notice to review the assessment, but that no objection was then or there made to it by Mygatt ; and that they then signed the assessment roll and attached thereto the certificate in that behalf required by the statute, and delivered it to the supervisor of the town. The return further alleged, that the assessment roll was delivered to the board of supervisors of Chenango county at its annual meeting in November thereafter, at which the proceedings as to the same prescribed by article third of the aforesaid title of the revised statutes were had, and the board caused to be entered in the appropriate column thereof, opposite the name of Mygatt and the sums set

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down as the valuation of his real and personal estate, the sum of \$128 as a tax to be paid thereon. That the board of supervisors delivered to the collector of the town of Oxford the assessment roll with the warrant annexed, as prescribed by law, commanding him to collect from the persons respectively therein named the amounts set opposite their respective names as taxes upon their property, and to pay out of the moneys so collected, (1.) To the superintendent of common schools, such sum as was raised for the support of common schools; (2.) To the commissioners of highways, such sums as were raised for the support of highways and bridges; (3.) To the supervisor of the town, all other moneys which had been raised to defray any other town expenses; (4.) To the treasurer of the county, the residue. That Mygatt refused to pay his tax, and the collector made the same by seizing and selling his property by virtue of the warrant, as he lawfully might; wherefore the tax was lawfully collected, and the supervisors refused to do as commanded. It appeared by the return as amended that Mygatt, after his removal to Oswego, was there in the year 1846 assessed for his personal property, and paid a tax thereon, and that he presented his claim mentioned in the alternative writ to the board of supervisors of Chenango county in November, 1847, and that it was denied and rejected.

The relator demurred to the return as amended, and the cause was heard by the supreme court at general term in the sixth district. Judgment was given that a peremptory writ of mandamus issue, directed to the supervisors of the county of Chenango, commanding them to cause the claim or account of the relator to be audited and allowed according to the command of the alternative writ. The supervisors appealed to this court.

*Samuel Beardsley*, for the appellants. I. Assuming that the relator, as he contends, was a non-resident of the town of Oxford, and so not liable to be taxed for his *personal* estate in that town; the seizure and sale of his property to pay the tax com-

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plained of was illegal, and for which he had *a certain remedy by action at law*. (1.) *The assessors of Oxford were liable to an action*. It was an illegal act to put the relator's name in the assessment roll of that town as liable to be taxed on his *personal* property, as set out in the roll, and by which they made themselves liable for all the consequences which followed from that act. It was an affirmation that he was liable to be thus taxed, and a virtual request and direction to have the tax imposed and collected. This, therefore, on a familiar principle, made the assessors parties to the illegal seizure and sale of the relator's property to pay the tax. (1 *Ch. Pl.* 91, *ed.* 1837; 1 *Arch. N. P.* 304, 305; *Flewster v. Royle*, 1 *Camp.* 187; *Weaver v. Price*, 3 *Barn. & Adol.* 409; *Davis v. Newkirk*, 5 *Denio*, 92; *Prosser v. Secor*, 5 *Barb.* 607; *Freeman v. Kenney*, 15 *Pick.* 44.) (2.) *The supervisors were, upon the same principle, liable to an action for the seizure and sale of the relator's property*. They imposed the tax and issued the warrant for its collection, and so were directly connected with the illegal seizure and sale. They had no power to do what they did, but acted without any jurisdiction or authority whatever. The supervisors cannot justify by what appears in the assessment roll, as a collector may by what is contained in his warrant. (*Abbott v. Yost*, 2 *Denio*, 86; *Van Rensselaer v. Cottrell*, 4 *How. Pr. Rep.* 376; *Noble v. Holmes*, 5 *Hill*, 194.) The supervisors, therefore, were trespassers. (See the authorities under subdivision 1, last above.) (3.) *An action for money had and received*, would lie in this case against the town of Oxford, for that share of this tax which was received by the town officers *for town purposes*; and perhaps, as suggested by Justice Mason in the court below, the relator might recover against the town for the whole of said tax, as well that which was for county as for town purposes. But however this might be as to the share paid into the county treasury *for county purposes*, an action would certainly lie against the county for that money. (1 *R. S.* 356, § 1; 357, §§ 2—8; 384, §§ 1—6; 364, §§ 1—4; 376, § 4; 367, § 4; 2 *id.* 478, § 95; 474, §§ 102, 103; *Amesbury v. Amesbury*, 17 *Mass. R.* 461;

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*Sumner v. First Parish in Dorchester*, 4 *Pick.* 361; *Engle v. Bosworth*, 5 *id.* 498; *Preston v. The City of Boston*, 12 *id.* 7; *Baker v. Allen*, 21 *id.* 382; *Boston v. Boston*, 4 *Metc.* 181; *Dow v. First Parish in Sudbury*, 5 *id.* 78.)

II. Here was a clear legal right, and a certain remedy, *by an action at law*, for its violation. A mandamus will not lie where such a remedy exists, however clear the right may be. (3 *Bl. Com.* 110, 264, 265; 3 *Steph. Com.* 680-685. *Bur. Law Dic. tit. Mandamus*; 1 *Chit. Gen. Pr.* 787, ch. 10, 789, 790, 791, 802; *Ex parte Fleming*, 4 *Hill*, 581; *The King v. The Bank of England*, *Doug.* 506; *The King v. The Bishop of Chester*, 1 *D. & E.* 396; *The King v. The Arch. of Cant.*, 8 *East*, 219; *The King v. The Margate Pier Co.*, 3 *B. & Ald.* 220; 2 *Chit. R.* 256; *Boyce v. Russell*, 2 *Cowen*, 444; *The People v. The Superior Court of N. Y.*, 18 *Wend.* 575; *The People v. The Supervisors of Albany*, 12 *John.* 414; *The People v. The Judges of Oneida*, 21 *Wend.* 20; *The People v. The Judges of Dutchess*, 20 *id.* 658; *Ex parte Lynch*, 2 *Hill*, 45; *The People v. Stevens*, 5 *id.* 617; *Ex parte The Fireman's Ins. Co.*, 6 *id.* 243; *The People v. The Supervisors of Columbia Co.*, 10 *Wend.* 363; *The People v. The Mayor &c. of New-York*, *Id.* 393; *The People v. The Corp. of Brooklyn*, 1 *id.* 318; *Thompson v. Ebbets*, *Hopkins' Ch. R.* 272; *In the matter of Morris*, *Shipley, &c.* 10 *John.* 484.)

III. A mandamus lies only to give effect to a clear *legal right*. This is indisputable, and that right must be set up in the alternative writ, which is in effect a declaration. This writ claims that the amount of the Oxford tax on personal property and costs, \$108.29, should be raised on that town *or* on the county of Chenango, and the judgment so directs. What right is there to have this sum raised on a town *or* the county? Further, had the relator a right to have the *whole* of said sum made of either the town or the county? What right had he to have the costs, \$8.29, which were paid to the collector, made of either the town or the county? (*The People v. Ransom*, 2 *Coms.* 490; *Dow v. First Parish in Sudbury*, 5 *Metc.* 78.)



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*N. Hill, Jr.*, for the respondent. I. No person can be legally assessed and compelled to pay taxes on his personal property, excepting in the town whereof he is a resident, when the assessment is made. Nor can he be compelled to pay a tax more than once, on the same property, in the same year. (1 *R. S.* 448, § 5; *Laws of 1850*, p. 142; 12 *Pick.* 10.)

II. The assessment of property, which regulates the amount of the tax, must be the act of *all* the assessors. The statute contemplates the exercise of their common discretion and judgment. It empowers assessors to divide the town or ward, by mutual agreement, into districts, not exceeding the number of assessors. This is for the purpose of inquiry and obtaining information, which may be performed by each assessor separately, but the assessment is the result of such inquiry and information, and must be the act of all the assessors. (1 *R. S.* 890; 7 *Barb.* 188; 1 *Comst.* 82; 4 *Denio*, 127; 3 *id.* 598; 21 *Wend.* 175; 7 *Coven*, 530; 2 *R. S.* 641, § 28.)

III. The visit of inquiry of the assessor, on the 22d of May, 1846, to the respondent, and the transactions on that day, were not an assessment. The assessment was not actually made until the assessors met on 24th of July, 1846, and compared information and prepared their assessment roll. The respondent at that time was a resident of a distant county. (*See cases cited under last point.*)

IV. The county of Chenango, or the town of Oxford, or both, have through their public officers wrongfully collected and received \$100 and over from respondent. This, in justice and equity, should be refunded by the body enjoying the benefit of it. The facts constitute a just claim against the town and county in favor of respondent. The cases show that Massachusetts' courts consider these cases in the light of money had and received, by the body receiving benefit of it. (*Thorndike v. The City of Boston*, 1 *Metc.* 242; *Dow v. The Inhabitants of the First Parish in Sudbury*, 5 *id.* 78; *The Boston and Sandwich Glass Co. v. The City of Boston*, 4 *id.* 181; *The Amesbury Woolen and Cotton Manuf. Co. v. The Inhab. of Amesbury*,

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17 *Mass. R.* 461; *Inglee v. Bosworth et al.* 5 *Pick.* 498, 461; *Sumner v. The First Parish in Dorchester*, 4 *id.* 361.)

V. The appellants possess the power to audit and allow this claim of respondent, and they have been rightfully ordered to collect and refund the same. (1 *R. S.* 418.) The account of respondent was duly presented to board of supervisors. They exercised no discretion in regard to it, as contemplated in some of the reported cases. It was not a question of *amount* with them. They refused to audit same as unlawful, for reasons set out in return. The supreme court are right in instructing them as to the law, and enforcing same by mandamus. (1 *R. S.* 418; 6 *Hill*, 464; 18 *John.* 242; 19 *id.* 259; 5 *Wend.* 114.)

VI. The supervisors having refused to proceed and pass upon the account, the mandamus in this case is properly ordered by the supreme court. "A mandamus is proper where a party has a legal right, and there is no other appropriate legal remedy." "A mandamus must *regularly be directed* to those persons by whose authority the party was deprived of the right, to which he applies to be restored." (*Esp. Dig.* 672; 3 *Dig. of N. Y. R.* 454; 2 *Barb. S. C. R.* 397; 1 *id.* 84; 3 *Hill*, 42.) (1.) There-spondent, with a clear legal right, has no other appropriate or adequate legal remedy. (10 *Wend.* 397.) (2.) The collector is not liable. The warrant, fair on its face, protects him. (5 *Wend.* 171; 7 *Barb.* 127.) (3.) No action lies against assessors. The assessment, though wrong, was a "judicial act." (*Weaver v. Deven-dorf*, 3 *Denio*, 117; 10 *Wend.* 47; 7 *Barb.* 139; 3 *Coms.* 467; 1 *East*, 555, and note p. 168; 11 *John.* 114, 158; 2 *Caines*, 312; 8 *Wend.* 468; 5 *Denio*, 595.) (4.) If an action against the assessors could be maintained, it would be no answer to relief in mode sought. To deprive a party of his remedy by mandamus, the remedy proposed must be not only appropriate, but adequate and specific. (*See all cases cited*; *Ang. & Ames on Corp.* 2d ed. 579; 1 *Barb.* 34.) (5.) If action were brought against town and county, remedy would not be *adequate* or *specific*. Both have enjoyed the fund arising from taxation. Both must be sued, to recover full amount. Multiplicity of suits is not

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favorable in law. A judgment against town or county could only be enforced in the mode adopted in this case, by mandamus. (1 *R. S.* 409, § 8; *Id.* 437, § 6; 10 *Wend.* 397; 4 *Barb.* 77.)

VII. The existence of another remedy, if one exists, does not interfere with the remedy by mandamus in case like this. (23 *Wend.* 461; 2 *Barb.* 419; 2 *Hill*, 46; 6 *Wend.* 567; 1 *Term*, 145; 6 *East*, 369; 2 *Burr.* 1045; 3 *id.* 1265.)

VIII. The writ of mandamus is a prerogative writ. It lies in the discretion of the court. The supreme court having ordered it, this court will not interfere with the exercise of their discretion, unless there has been a gross abuse, even were precedents wanting. But authorities are abundant to sustain the writ. The most accomplished judges have granted it in like cases, to put supervisors in motion, or to correct their practice. (18 *John.* 242; 19 *id.* 259; 3 *Cowen*, 358; 5 *Wend.* 125; *People v. Supervisors of Columbia Co.*, 10 *id.* 363; 4 *Barb.* 77; 5 *Wend.* 125; 4 *Paige*, 400; 9 *id.* 186; 2 *Barb.* 417; and cases cited 18 *Wend.* 91.)

PARKER, J. At the time Mygatt was called upon by Washburn, one of the assessors of Oxford, in the county of Chenango, for the purpose of obtaining the necessary information to enable the assessors to make the assessment, he was a resident of that town, but soon thereafter, in the same month, he removed to the county of Oswego. The statute requires that the owner of personal estate should be assessed for it in the town where he resides, (1 *R. S.* 389, § 5;) and the first question to be determined in this case is, whether the assessment of Mygatt was made at the time he was called upon by Washburn.

One assessor cannot make an assessment; it is the joint act of all, or at least of a majority of the assessors. (2 *R. S.* 555, § 27; 7 *Cowen*, 530; 21 *Wend.* 175; 3 *Denio*, 598; 4 *id.* 127; 1 *Const.* 82.) In accordance with a provision of the statute, (1 *R. S.* 390, § 7,) the assessors had divided their town into convenient assessment districts, and Washburn was assigned to the one in which Mygatt then resided. The statute requires

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the assessors, between the first days of May and July in each year, to proceed to ascertain by diligent inquiry the names of all the taxable inhabitants within the town, and all the taxable property, real and personal, within the same. (1 R. S. 390, § 8.) It was for the purpose of making such inquiry, that Washburn called upon Mygatt at the time mentioned; and the statute seems to imply, by giving the assessors till the first of July to make such inquiries, that the assessment is not to be made till after that time. After giving such time, it proceeds in the next section to require that *they*, the assessors, shall prepare an assessment roll, and prescribes the form of it, and what it shall contain. It subsequently requires that such assessment roll shall be completed on or before the first day of August. The assessment roll is thus to be made out between the first of July and the first of August. That roll is the assessment, which may afterwards be reviewed or corrected in the manner prescribed by the subsequent provisions of the statute.

All that is done by the several assessors, in taking down names and entering descriptions and amounts in their respective districts, previous to the first of July, is merely the obtaining of information, preliminary to the assessment to be made when all the assessors meet in July, and examine and correct and alter such memoranda when they make out the assessment roll.

If I am right in this construction of the statute, the assessment was not made on the 22d of May, but in July, and Mygatt was a resident of the county of Oswego when the assessment was made. It follows that the assessors of the town of Oxford erred in assessing him for personal property, and that the relator has been subjected to the payment of an illegal tax.

But it is denied that the relator is pursuing the appropriate remedy, and it is contended that he can have no relief by mandamus, because he had, as is alleged, a complete remedy at law. If the relator had a remedy by action, it was not against the town of Oxford. It was decided in *Lorillard v. The Town of Monroe*, (12 Barb. 161,) that an action will not lie against a town for an error made by the assessors of taxes of the town; and

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the judgment in that case was affirmed by this court. (1 *Kern*. 892.) It may now, therefore, be considered as settled, that such officers are not the agents of towns, so as to render the towns liable, in their corporate capacity, for the mistakes of such officers.

But had not the relator a remedy against the assessors? I think they acted without jurisdiction, and that their proceedings were void. In assessing personal property, they had jurisdiction only over residents. I concede that assessors act judicially. If Mygatt had been a resident when assessed, and they had erred as to the amount, they would not have been liable for error. (*Weaver v. Devendorf*, 3 *Denio*, 117; 7 *Barb.* 137; 8 *Comst.* 466.) But if they had no jurisdiction to act at all, they are liable. It is only when acting within their limited jurisdiction that they can be protected as acting judicially. (*Prosser v. Secor*, 5 *Barb.* 607.) If this is so, they were liable, and might have been prosecuted for their act in subjecting the relator to the payment of an unfounded and illegal tax. The relator had, therefore, a legal remedy by action.

The general rule has been held to be, that a party could not have a remedy by mandamus, when he had a legal remedy by action. (1 *Tenn. R.* 104; 2 *Cow.* 444; 1 *Wend.* 325; 10 *John.* 484; 10 *Wend.* 367; 6 *Hill*, 248; 12 *John.* 415; 19 *id.* 259.)

It has been said that "this is not universally true in relation to corporations and ministerial officers;" (*McCullough v. The Mayor of Brooklyn*, 23 *Wend.* 459;) and in that case, where it appeared the common council had neglected its duty in omitting to issue a warrant to collect a tax, Bronson, J., said, that an action on the case would *perhaps* lie in favor of the plaintiff, who would be entitled to the money when collected, but that a mandamus would be a more appropriate remedy.

The remark that corporations and ministerial officers were excepted from the general rule, was repeated in 2 *Barb.* 399 upon the authority last cited, and a case in 10 *Wend.* 393, which seems to warrant no such conclusion. On the contrary, Nelson, J., in

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that case says, "The proposition is, I believe, universally true, that the writ of mandamus will not lie, in any case, where another legal remedy exists, and it is used only to prevent a failure of justice. If such an exception exists, it can extend, I think, no further than was expressly recognized in *McCullough v. The Mayor of Brooklyn*, viz: if there be a refusal to perform a duty expressly devolved on the corporation, though an action on the case would *perhaps* lie, a mandamus may be awarded; and that is hardly more than saying, "if the remedy by action be doubtful, a mandamus will lie."

But a mandamus will only lie to give effect to a clear *legal right*. (2 *Comst.* 490; 5 *Metc.* 78.) What right has the relator in this case to insist that the defendants shall compel the town of Oxford to refund the money thus illegally levied? The act by which the relator was deprived of his property was a tortious one. We have seen that the town was not liable in its corporate capacity for the tortious act of its assessors. It cannot be indirectly subjected to that for which it is not directly liable. The board of supervisors has no duty imposed on it by statute to redress grievances of this description; nor is power given by statute to compel towns to refund money in compensation for the wrongful acts of the town officers. Power is conferred "to audit the *accounts* of town officers and other persons against their respective towns; (1 *R. S.* 367, § 4;) but this claim is not an *account* within the meaning of the statute, nor is it a legal claim against the town.

It is a plausible view of the claim of the relator, to say that the town has had the benefit of the money so illegally collected. And that I concede to be true, whether the money raised was applied to town, or county, or state purposes, or part to each; because it was applied to pay so much money, that the town was required to raise by tax. It may therefore seem equitable that the town should refund. But the answer to this is, that the town was in no way a party to the transaction, nor was the money applied to its use with its assent. No more debt or obligation to repay has been created, than where money is volunta-

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*Gould against McCarty.*

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rily paid for another without his request or knowledge, and not in pursuance of any duty. True, it was compulsorily obtained, but that compulsion was exercised, not by the town or its agents but by third persons, for whose acts it is in no respect responsible; (12 *Barb.* 161;) and if those third persons have paid it voluntarily for the use of the town, it has created no liability as between the town and the relator, so long as the relator is not pursuing the specific property taken.

I think the relator has no legal right to the remedy sought to be enforced. It was not the duty of the board of supervisors to determine the question of the relator's residence. It had no power to hear the proofs and sit in judgment on the case, and to decide whether and by whom a tortious act had been committed. It had no legal control over the delinquent parties to compel them to make restitution. It is only where a board of supervisors stops short and refuses to perform a duty plainly devolved upon it, that a mandamus will be awarded. The judgment of the supreme court should be reversed.

All the judges concurred.

Judgment accordingly.

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*GOULD against McCARTY.*

The supreme court is authorized by the revised statutes (2 *R. S.* 199) to compel a defendant in a suit pending therein to make discovery of books, papers and documents in his possession or power relating to the merits thereof, and which are necessary to the plaintiff to enable him to prepare for the trial.

The 388th section of the code is not a substitute for the provisions of the revised statutes, but is auxiliary thereto.

The superior court of the city of New-York has the same powers to compel discovery by the parties to a suit pending therein, which are conferred by the revised statutes upon the supreme court; (*Laws of 1841, p. 22;*) and where the defendant, in an action pending in that court, refused to comply with an order

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Gould *against* McCarty.

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directing him to make discovery, to enable the plaintiff to prepare for trial; *Held*, that the court was authorized to strike out his answer, and render judgment as though no answer to the complaint had been made.

THE action was brought in the superior court of the city of New-York, to recover damages for the non-delivery of stock in the New-York and Erie Railroad Company, contracted Sept. 27, 1851, by the defendant, to be sold and delivered to the plaintiff. The answer of the defendant alleged that, at the time of the making of the contract, the defendant was not in the actual possession of the certificates or other evidence of shares of the capital stock contracted to be sold, nor was he entitled in his own right, or authorized by any person entitled to sell or transfer the stock, and that the contract with the plaintiff was a stock-jobbing transaction which the plaintiff knew, and contrary to the statute and void. The plaintiff by his reply took issue upon these allegations contained in the answer. After issue was joined, the plaintiff, on notice to the defendant's attorneys, presented to the superior court at special term a petition, which stated that the defendant had in his possession or under his control certain books, papers and documents relating to the merits of the action, containing entries, writing and memoranda of purchases, sales, loans or hypothecations of stock of the New-York and Erie Railroad Company, made by the defendant for himself or others, and prayed that a discovery of such books, papers and documents might be made under the direction of the court. The petition was verified by the affidavit of the plaintiff, in which the plaintiff also stated that the books, papers and documents in the petition mentioned were not in his possession or under his control, and that, as he was advised by his counsel and believed, the discovery of the same as prayed in the petition was necessary to enable him to prepare for trial. Counsel for the defendant opposed the application, and read in opposition thereto an affidavit of the defendant, in which he denied that he had in his possession or under his control any books, papers or documents mentioned in the petition, or containing any of the entries, writing or memoranda therein mentioned, "except



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*Gould against McCarty.*

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the private book kept by the defendant for his own convenience, in which he made short entries or memoranda of the purchases and sales of stock, or contracts therefor, and his ordinary check book kept in the usual manner." The court made an order, requiring the defendant to deliver to the plaintiff's attorney sworn copies of all entries in the defendant's books, and papers containing evidence relating to the merits of the action, within twenty days, and staying all proceedings in the cause. From this order the defendant appealed to the general term. On the argument of the appeal, the court modified the order made at special term by ordering that the defendant, within twenty days after the service of the modified order, deliver sworn copies of all entries and memoranda in his check book or private memorandum book mentioned in the affidavit of the defendant, read in opposition to the application at special term, made or dated Sept. 27, 1851, or within twenty days before or after that date, showing or tending to show purchases or sales of the stock in question, or the ownership or control of any such stock, either by the defendant in his own right, or by him for or on behalf of any other person, or authority in the defendant to sell or deliver any of the stock.

The defendant, in pursuance of this order, delivered to the plaintiff what purported to be copies of memoranda and entries as to the sale and purchase of the stock during the time mentioned in the order, accompanied by his affidavit, in which he stated that the same were full and true copies of the entries and memoranda, except that in a few instances the initials of the name of the individual, on whose account the stock in the memorandum referred to was purchased or sold, were omitted; and that this was done because such purchases and sales were made for the individuals whose initials were omitted, in strict confidence that their names should never be disclosed, and that a disclosure of their names would be injurious to them in their business, and could in no way be material to the issue, or beneficial to the plaintiff in the case. At a subsequent special term of the court, on the application of the plaintiff, an order was made that the defendant, within a time named, deliver to the plaintiff's

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attorneys copies of the entries and memoranda which were omitted in the discovery before made ; and that in default of so doing he show cause at a special term of the court to be held in November, 1852, why his answer should not be stricken out, or the plaintiff have such other relief as to the court should seem meet. The defendant did not comply with the order, and at the November special term, after hearing counsel for the respective parties, the court made an order striking out the answer of the defendant, and permitting the plaintiff to take judgment as though no answer to the complaint had been served. This order directed a reference to ascertain and report the amount due the plaintiff.

The referee reported the amount due the plaintiff to be \$2883.94, for which sum and costs judgment was entered. The defendant appealed from the judgment to the general term of the superior court, at which it was affirmed ; he then appealed to this court from the judgment of affirmance.

*E. S. Young*, for the appellant. I. If the application in this case could be considered as a proceeding under the 388th sec. of the code, then the order of November, and the judgment entered thereon, are clearly erroneous, the court having no authority under that section to strike out an answer or defense of the party. (*See Staunton v. Delaware Mutual Ins. Co.*, 2 Sand. 663.)

II. But this was an attempt by the plaintiff, by proceedings under the revised statutes, to obtain a discovery of papers, &c., containing "evidence" to enable him to prepare for the trial. And the original order for discovery, and the order of the general term affirming the same, are erroneous, and ought not to have been made on the application made to the court ; for, 1st. The jurisdiction of the court to order discovery under the revised statutes, extends only to the cases provided by the general rules of the supreme court. Those rules do not provide for discovery in such case. (2 R. S. 3d ed. 262, § 31 ; *Supreme Court Rule* 8 ; see also 8 *How. Pr. Rep.* 91.) 2d. But if this were a proper case for the proceeding under the revised statutes, then the court

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must be governed therein by the principles and practice of the court of chancery in compelling discovery. By the practice of the court of chancery and under the revised statutes, (1.) A necessity for the discovery must be shown. (2 *Story's Eq. Jur.* § 1497; *Lane v. Stebbins*, 9 *Paige*, 622; *Nieury v. O'Hara*, 1 *Barb. S. C. Rep.* 484; *Moore v. McIntosh*, 18 *Wend.* 529; *Pepper v. Chambers*, 7 *Eng. Law and Eq. Rep.* 589; *See* 6 *How. Pr. R.* 398; 2 *Sand. S. C. Rep.* 663.) On this application such necessity was not shown. (2.) The papers, &c., sought to be discovered, must be such as the party making the application has some interest in. (*Watson v. Renwick*, 4 *John. Ch.* 381, 385; *Burton v. Neville*, 2 *Cox's Cas.* 242.) (3.) The party applying must, by the practice of the court of chancery, set forth the particulars of which discovery was sought. A mere fishing application, to ascertain whether the party has books or papers containing evidence, would not be entertained. (*Lane v. Stebbins*, 9 *Paige*, 622; *Hoyt v. Am. Ex. Bank*, 8 *How. Pr. R.* 92; 2 *Phil. Ev.* 194, 3d ed.)

*Charles Tracy*, for the respondent. I. The right to a discovery, by interlocutory proceedings in an action at law, is secured by statutes and by general rules of practice. The discovery may be had in preparation for pleading, or after issue joined in preparation for trial. It is designed to accomplish all the purposes of a bill of discovery, except the procuring of the personal testimony of the party himself, and is liberally allowed by the courts. (2 *R. S.* 199, § 21-27; *S. Laws* 1841, p. 22; *Code of Proc.* § 388; *Supreme Court Rules* of 1847, rules 27-30; 1849, rules 8-11; 1852, rules 8-11; 1854, rules 8-11; *Follett v. Weed*, 3 *Howard's Pr. R.* 308; *Stanton v. Delaware Mut. Ins. Co.*, 2 *Sandf. S. C. R.* 662; *Moore v. Pentz*, *id.* 664; *Powers v. Elmendorf*, 4 *How.* 60; *Pollock on Power of Courts*, 14, 22, 46, [77 *Law Lib., O. S.*]; *Bluck v. Gompert*, 6 *Eng. Law and Eq. R.* 524; *Scott v. Walker*, 22 *id.* 134; 1 *Monell's Pr.* 515.)

II. The order of the court striking out the defendant's

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Gould against McCarty.

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answer, for his refusal to make the discovery required, was the correct practice in the case. 1. This very remedy is given by the statute. (2 R. S. 200, § 26.) 2. It is also within the authority given by the code of procedure. (Code, § 388.) 3. The positive refusal of the defendant to make the required discovery was sufficient evidence that his answer was a sham defense, and authorized the striking of it out on that ground. (Code, § 152.) 4. The course taken by the court below is well sustained upon the inherent powers of a court to exercise an equitable jurisdiction over its suitors. (*People v. Oneida Com. Pleas*, 18 Wend. 652; *Swift v. Collins*, 1 Denio, 659; 1 *Graham's Prac.* 3d ed. 671-675; *Lawrence v. Ocean Ins. Co.*, 11 John. 245; *Walsh v. Murray*, 4 Cowen, 399.)

III. The several orders of the court below, requiring the defendant to make discovery, are not proper matter of review on this appeal. 1. They were not such intermediate orders as may be reviewed on appeal in this court. (Code, § 11.) 2. They were an exercise of the discretionary power of the court in matters of mere practice, and in its summary control over the conduct of suitors. (*Fort v. Bard*, 1 Comst. 43; *Wakeman v. Price*, 3 id. 334.)

GARDINER, Ch. J. The revised statutes declare "that the supreme court shall have power in such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein." (2 R. S. 199, § 21.) The twenty-sixth section provides for the case of a party neglecting or refusing to obey an order for such discovery, and among other things, authorizes the court to strike out any plea or notice that may be given. The first section of the act of 1841, "to enlarge the powers of certain courts of record," (*Laws of 1841*, § 22,) declares that the superior court shall possess and exercise in all cases pending before it, the same powers granted to the supreme court by the revised statutes, to compel the discovery and the production of books,

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Gould *against* McCarty.

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papers and documents, in cases pending before that court." By the twenty-third section of the revised statutes, "to entitle a party to any such discovery, he shall present a petition, verified by oath, upon which an order may be granted by the court for such discovery, or that the other party show cause why the discovery should not be granted." In the case before us, the plaintiff presented his petition to the superior court, by which an order was granted for the discovery sought, which was subsequently modified at the general term, and made peremptory upon the defendant; and upon his *neglect* to comply with its provisions, an order was made that he show cause why his answer should not be stricken out, which was afterwards made absolute, after hearing the defendant in opposition.

It will be perceived that the proceedings upon the part of the plaintiff were in exact conformity to the requirements of the 23d section above quoted, and that the preliminary order of the court to show cause, and the final order striking out the answer of the defendant, were in like manner expressly authorized by the 23d and 26th sections of the same statute. There is, therefore, no objection to the mode in which the discovery was sought or the relief was granted, if the superior court had jurisdiction to act at all in the premises. It is claimed that the 22d section of the act requires, "that the supreme court shall, by general rules, prescribe the cases in which such discovery may be compelled." This is true. But the omission to frame rules does not annul the inherent power of the court to compel a discovery, or the power granted by the previous section; but the general rules were designed to regulate its exercise. (11 *John. R.* 245; 9 *Wend.* 458.) Jurisdiction does not depend upon the rule, but the rule is a consequence of the jurisdiction. By the act of 1841, (*supra*), the superior court "possess and may exercise" all the powers granted to the supreme court. The authority thus granted is not suspended until rules are established by the supreme court, but may be exercised in all cases where the mode of proceeding is prescribed by statute. Such is the case before us. The 388th section of the code is not a substitute for the provi-

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*De Peyster against Hasbrouck.*

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sions of the revised statutes, but auxiliary to them. By the previous statute, the court was restricted to the remedies there provided, where a discovery was refused by a party, against whom an order for that purpose had been granted. But, by the code, power is given to exclude the document from being given in evidence, or to punish the party refusing, or both. (*Code*, § 388.)

There is no error in the final judgment of the superior court, or in the intermediate order which led to it. It must therefore be affirmed.

RUGGLES, PARKER, EDWARDS, ALLEN and SELDEN, Js., concurred.

DENIO and JOHNSON, Js., dissented.

Judgment affirmed.

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*DE PEYSTER against HASBROUCK and others.*

Where a mortgage does not cover all of premises owned by the mortgagor which he by false and fraudulent representations induced the mortgagee to believe were included therein, when the latter made a loan and accepted it as security therefor, a court of equity will, as against the mortgagor or his voluntary grantee, reform the mortgage and enforce it against the part of the premises not originally embraced therein.

Accordingly, where an applicant for a loan proposed to secure its repayment by a mortgage upon premises which he stated had been conveyed to him by a party named, and by false and fraudulent representations induced the lender to believe that certain valuable erections, which were situate on adjacent premises owned by the applicant, were upon the premises so conveyed to him, and the lender made the loan and accepted a mortgage executed by the applicant containing a description which included only these premises, believing, and the applicant representing to him that the erections were embraced, and the mortgagor soon thereafter conveyed the land on which the erections were situate,

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*De Peyster against Hasbrouck.*

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without consideration, in trust for his wife; in an action by the mortgagee against the mortgagor, his wife and her trustee, the trust deed was adjudged invalid against the mortgage, the latter was reformed so as to embrace the land with the erections thereon, and a decree of foreclosure and sale was made as to all the premises.

THE action was commenced in September, 1848, by De Peyster against Joseph O. Hasbrouck and Eliza his wife and others. The complaint alleged the following facts: That in January, 1846, Joseph O. Hasbrouck applied to the plaintiff in New-York for the loan of \$12,000, and represented that he owned about seventy acres of land, situate in New Paltz, Ulster co., with the buildings, &c. thereon, as mentioned in the certificates hereafter referred to, upon which he proposed to execute a mortgage to secure the repayment of the loan. Subsequently, and during the negotiation, Hasbrouck produced and left with the plaintiff, a certificate signed by Samuel Johnson and Martinus Millspaugh, headed, "A statement of property owned by Joseph O. Hasbrouck in the town of New Paltz," wherein they certified that the property therein mentioned was, in their judgment, worth the sums set opposite each portion thereof, and in which the land was stated as being worth, without the buildings thereon, \$7000, and then followed an enumeration of the mills, buildings, &c. thereon, each estimated at a separate amount; and among these were the following: "Tanning yard with a large building, and a bark mill run by water, worth \$1500; two store houses worth \$1000; a large house occupied as a tavern, with sheds and stables, worth \$2000; a mansion house, worth \$3000; and a dwelling house occupied by one Johnson, worth \$2500." The value of the property as stated in this certificate, amounted to \$31,800. Hasbrouck also produced and left with the plaintiff another certificate of valuation, signed by Willett Linderman, headed "A statement of the real estate owned by Joseph O. Hasbrouck in Tathilltown, Ulster co., a farm of about 70 acres, including," &c. Here followed a statement of the land, and the various erections thereon, with the value of each. Among these were the same erections mentioned in the other certificate, and the

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*De Peyster against Hasbrouck.*

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valuation of the entire property amounted to about \$27,000. The plaintiff being satisfied with the property as security for the proposed loan, referred Hasbrouck to E. H. Owen, Esq. as his attorney, to examine the title, and if it was found satisfactory, to prepare a bond and a mortgage thereon for the amount. Mr. Owen reported that the title was satisfactory, and prepared a bond and mortgage, the former of which was executed by Hasbrouck, and the latter executed and acknowledged by him and his wife, conditioned for the payment of \$12,000 and interest. The premises covered by the mortgage were described therein by courses and distances, and a reference to adjacent lands and monuments, so that a party could not locate them without going upon the ground and having them traced by a surveyor or the lines pointed out. The description concluded as follows: "containing sixty-eight acres and  $\frac{1}{16}$ , be the same more or less, excepting two acres and  $\frac{1}{16}$ , formerly belonging to James McCullough." The mortgage did not mention or refer to the erections upon the mortgaged premises. The complaint alleged that during the negotiation, Hasbrouck represented that the premises proposed to be mortgaged, and upon which the erections mentioned in said certificates were situate, had been conveyed to him by the Bank of Poughkeepsie, and the description of the premises in the mortgage was copied from the deed which he furnished, executed by the Bank of Poughkeepsie to him; that when the mortgage was executed, Hasbrouck stated and represented that it covered all the property mentioned in the certificates of valuation; and that subsequently, and before the plaintiff advanced to him the full amount of the \$12,000, he signed a paper attached to the certificates of valuation, whereby he stated "that all the property, mill privileges, buildings, &c., mentioned and valued in the annexed certificates, are covered and intended to be covered by the mortgage to J. Watts De Peyster, (the plaintiff,) being upon the land purchased of the Bank of Poughkeepsie 20th of May, 1839, and were offered as security for the same loan, when it was applied for, and that he, Hasbrouck considered the property of the full value set upon it in said cer-



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*De Peyster against Hasbrouck.*

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tificates." Before the plaintiff advanced the money upon the bond and mortgage, Hasbrouck executed to him a paper by which he agreed to insure the property offered as security for the loan to the amount of \$12000, and keep it insured for that amount during the existence of the mortgage, and to assign the policy to the plaintiff as collateral security. That the plaintiff made the loan and accepted the mortgage, relying upon and believing the representations and statements of Hasbrouck that it covered all the property mentioned in the certificates, and which he owned at New Paltz, and that but for such representations and belief he would not have done so; that at the time of the loan, Hasbrouck assigned to him policies of insurance upon the buildings mentioned in the certificates as collateral security, and some of which were upon the property which was not included in the mortgage.

The complaint further averred that, in point of fact, the tannery and bark-mill and the other buildings, above particularly specified as contained in the certificates, were not upon the premises described in the mortgage or embraced within the description therein contained, but were situate on two small parcels of land, the one containing two and one half acres, and the other one acre situate adjacent to the land described in the mortgage, both of which parcels were owned by Hasbrouck at the time of the negotiation for the loan and the execution of the mortgage. Soon after the bond and mortgage were executed and the money advanced thereon, Hasbrouck, by a deed executed by himself and Eliza his wife, conveyed the two small parcels of land above mentioned to one Mitchell, one of the defendants, in trust for the separate and sole use and benefit of the said Eliza. It was alleged that at the time of this conveyance, Hasbrouck was insolvent; that he subsequently conveyed the mortgaged premises to a third person, and was, at the time of commencing the suit, entirely insolvent. That default had been made in the payment of the amount secured by the mortgage, and that the premises covered thereby were an inadequate security for the same.

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*De Peyster against Hasbrouck.*

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The complaint prayed that the deed in trust to Mitchell of the two small parcels be declared void as against the plaintiff's mortgage; that the lien of the mortgage be decreed to extend over the said two small parcels of land and the erections thereon, with the same force and effect as though they had been included therein; and that the usual decree of foreclosure and sale as to all the premises be made, or that the plaintiff have such other relief as should be deemed adequate and proper. Hasbrouck did not answer the complaint. His wife put in an answer, by which she controverted most of the material allegations contained in the complaint, and insisted that the two parcels conveyed in trust for her to Mitchell should not be subjected to the lien of the mortgage. Some of the other defendants answered, but their claims are not material to the question discussed and decided on the appeal to this court.

The cause was tried at the Ulster county circuit, in 1851, before Justice Harris. The certificates of valuation and the writing executed by Hasbrouck thereto annexed, and also the agreement executed by him to insure the property and assign the policies to the plaintiff, were read in evidence as the same are in the complaint stated. The bond and mortgage were also given in evidence, and it was proved that Hasbrouck assigned to the plaintiff the policies of insurance upon the property as in the complaint alleged. A good deal of other evidence was given upon the trial, but the same and the conclusions of fact arrived at by the justice who tried the cause, are sufficiently stated in the opinion of Denio, J. Justice Harris denied the relief prayed as to the two small parcels of land not included in the mortgage, and gave the usual judgment of foreclosure as to the premises included therein. The plaintiff's counsel excepted to that part of the decision denying the relief asked as to the premises not included in the mortgage. The judgment was affirmed by the supreme court at general term in the third district. The plaintiff appealed to this court. The cause was submitted on printed points.

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De Peyster *against* Hasbrouck.

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*C. Livingston*, for the appellant.

*R. W. Peckham*, for the respondent.

DENIO, J. I am prepared to concur with the supreme court in its conclusions upon the matters of fact, as they are stated in the opinion delivered by Mr. Justice Harris, before whom the action was tried. According to that opinion, which I think is sustained by the testimony, the defendant Joseph O. Hasbrouck, in the spring of 1846, applied to the complainant for a loan of \$12,000, upon the security of certain real estate which Hasbrouck owned in the county of Ulster, and which he offered to mortgage to the plaintiff. It was understood between them that the real estate to be mortgaged was the same which had been conveyed to Hasbrouck by the Bank of Poughkeepsie, and during the negotiations for the loan Hasbrouck produced and delivered to the counsel for the plaintiff the conveyance executed by that bank to him, and the mortgage ultimately given to the plaintiff was copied, as to the description of the premises, from that deed. In this deed the premises are described in a manner which would convey no precise idea of their particular boundaries to a person not acquainted with the locality, nor even to such a person unless he had traced the lines on the spot with a chain and compass, or they had been pointed out to him. The description concluded with a statement that the land conveyed and described contained sixty-eight acres and sixty-nine hundredths of an acre, and there was excepted from this, two acres and five-tenths of an acre, stated to have formerly belonged to James McCullough. During the negotiations, and before the plaintiff had advanced to Hasbrouck any part of the money, the latter exhibited and delivered to the plaintiff, two several appraisements of the real estate proposed to be mortgaged, one signed by Samuel Johnson and Martinus Millspaugh, and the other by Willett Linderman. The first was headed, "A statement of property owned by Joseph O. Hasbrouck in the town of New Paltz," and foots at \$31,300; and

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*De Peyster against Hasbrouck.*

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the other was entitled, "A statement of real estate owned by Joseph O. Hasbrouck, in Tuthilltown, Ulster county, New-York," and the aggregate of the items in this paper was \$27,000. Each statement estimated the land separately, without the buildings, as being about seventy acres, and worth \$7000. The remainder of each statement consists of a separate valuation of the various buildings on the land, consisting of manufactories, mills, hotel and dwellings of various kinds. The two statements are each designed to embrace the same property, some of the buildings being entered under different names. Tuthilltown is understood to be the name of a village which is situated in the town of New Paltz. Annexed to these appraisements were two other certificates, signed respectively by J. O. Linderman and E. P. Benjamin. In one there is an estimate of "the real estate in land owned by the said Joseph O. Hasbrouck in Tuthilltown," and the other speaks of the value of "the property now owned by one Joseph O. Hasbrouck in Tathilltown." A portion of the erections thus appraised, seven or more in number, and embracing a tannery, mill and yard, and valued together, according to the certificate of value which states the lowest prices, at \$6500, did not in truth stand on the premises conveyed to Hasbrouck by the Bank of Poughkeepsie; but are two pieces of land immediately adjoining, one containing two and an half acres, and the other one acre of land; and consequently were not embraced in the plaintiff's mortgage. Prior to the payment to Hasbrouck of the whole amount loaned, and when \$1336.88 remained to be advanced, Hasbrouck, at the instance of the plaintiff, signed a statement appended to the certificates of value, affirming in positive terms that all the property, mill privileges, buildings, &c., mentioned and valued in the certificates of value which have been mentioned, were covered and intended to be covered by the mortgage which had been executed to the plaintiff, "being," it was added, "upon the land purchased of the Bank of Poughkeepsie, 20th May, 1839," and that "they were offered as security for the said loan when it was applied for." The plaintiff required as a condition to the loan, and which was assented to

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*De Peyster against Hasbrouck.*

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by Hasbrouck, that the latter should procure policies of insurance against fire, and Hasbrouck procured and assigned to the plaintiff such policies in respect to the buildings on the small pieces of land, as well as in regard to those on the premises purchased of the Bank of Poughkeepsie, and included in the plaintiff's mortgage. There are a few other circumstances less material than those which have been stated, but having in a slighter degree the same tendency. The supreme court concluded from these facts, and all the evidence in the case, that Hasbrouck, by the means which have been referred to, induced the plaintiff to believe that the buildings and improvements standing upon the small parcels of land, were in fact a part of the premises described in the mortgage; and that the plaintiff was actually made to believe that his mortgage covered all the property described in the certificates of valuation; and that in this respect the plaintiff was deceived and defrauded. Agreeing entirely with the result of the examination of the learned justice of the supreme court in this respect, and thinking it warranted by the evidence, I do not consider it necessary to go more into detail on this part of the case.

The supreme court was of opinion that it did not possess the power of so reforming the mortgage as to make it embrace the small parcels of land upon which these buildings stood, though that land was then owned by Hasbrouck and subject to his disposal. The hesitancy of the court arose out of the consideration, that the lender understood that the land conveyed by the Poughkeepsie bank embraced the whole promises upon which he had agreed to make the loan; and that inasmuch as the land thus conveyed was included in the mortgage, he obtained a lien upon the whole subject contemplated by the agreement, and has therefore no right to this species of redress. But the extent of the area of land was a circumstance of minor consideration compared with the buildings and improvements. Two or three acres, more or less, would vary the security only to the amount of as many hundred dollars, whereas the failure to obtain a lien on the buildings, reduced it by twice as many thousands. If the plaintiff contract-

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ed for a lien restricted by the limits of the Poughkeepsie bank conveyance, he at the same time contracted for an incumbrance upon all the land upon which the enumerated buildings stood, and the latter circumstance we cannot fail to see was the one which must have operated upon his mind to assent to the transaction. It does not appear that any particular number of acres were contracted for, or what precise area was conveyed by the mortgage. The manner in which Hasbrouck obtained his title was a circumstance of entire indifference. It is plain that the plaintiff was mistaken and misled when he supposed that the bank conveyance was so limited as to leave out the tannery, factory, the hotel, &c.; and when he assented to have the premises contained in that conveyance transcribed into his mortgage, he acted under a fatal mistake as to the extent of the premises contained in that description. He thought, and Hasbrouck induced him to believe, and knew that he did believe, that the lines therein mentioned, when traced on the ground, would include the tannery, factory, &c. To me it seems very plain that it is no answer to say to the plaintiff, you obtained a lien upon all the ground contained in the bank deed. He can properly reply: The deed from the bank was of no moment, except for the supposition that it covered the valuable erections which I was to obtain a lien upon as security. The deed was used only as a convenient method of describing those premises; but now that it appears that it only embraced a part of them, it would be inequitable to limit me to the deed which, in the actual circumstances, was used only as an instrument to deceive. The case is similar to *Wiswall v. Hall*, (3 Paige, 313,) where the defendant, being the owner of a certain lot No. 22, bounded on the Hudson river at the line of tide water, had obtained a grant from the corporation of the right to erect a wharf in front of his lot, and had erected such wharf thereon. He then contracted to sell the premises to the complainant, and conveyed them as lot No. 22, &c., as the same was described in and had been occupied and held under a certain deed which was particularly described, executed by Van Rensselaer to McCartan, and by the latter as-

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signed to the defendant. Now this lot No. 22 did not embrace the wharf, nor was that conveyed by Van Rensselaer to McCartan, but the defendant held it under a different title, namely, the grant from the corporation. The defendant by his answer insisted, as the present defendant does, that he did not intend to sell any thing more than the lot as it originally was. The chancellor said he was satisfied from the evidence that this allegation was literally true; but he was also of opinion that the defendant knew that the plaintiff did not so understand the bargain, and that although he assented to take a conveyance limited to the land embraced in lot No. 22, and conveyed by Van Rensselaer to McCartan, it was only because he believed that lot and conveyance embraced the wharf as well as the upland, and he decreed that the defendant should execute to the plaintiff a release of the wharf. This case is upon principle identical with the one before the court; and it is unnecessary to refer to cases to establish the familiar doctrine that where, through mistake or fraud, a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity so as to correspond with such actual agreement. The English cases have been ably digested by Chancellor Kent, and the principle has been stated with his accustomed care and accuracy in *Gillespie v. Moon*, (2 *John. C. R.* 585.)

There is no evidence that the defendant, Mrs. Hasbrouck, was a party to the deception. Her contingent right of dower must not therefore be affected by the decree or sale of the premises not actually embraced in the mortgage.

The trust deed being between husband and wife, and no consideration being shown, must be regarded as purely voluntary. As neither Mrs. Hasbrouck or the trustee are proved to have parted with any thing to obtain that conveyance, it cannot be set up against the complainant's equity. (*Burgh v. Francis*, 1 *Eq. Cas. Ab.* 320, *pl.* 1; *Taylor v. Wheeler*, 2 *Vern.* 564; *Russel v. Russel*, 1 *Bro. C. R.* 269; *Dickerson v. Tillinghast*, 4 *Paige*, 215.)

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The judgment of the supreme court must be reversed, and a judgment entered declaring the rights of the parties according to the principles stated in this opinion, and with the usual provision contained in a decree of foreclosure. It will direct the premises described in the mortgage to be first sold, and the other parcels to be sold only in the event of a deficiency in the amount of principal, interest and costs, arising out of the first sale. If there should be a surplus arising out of the sales of the smaller parcels, the judgment will direct that it be retained by the sheriff to abide the further order of the court; it will direct the plaintiff's costs in the supreme court to be paid by the defendant, Joseph O. Hasbrouck, and no costs of any of the parties against the others to be allowed in this court. Should the parties be unable to agree upon the form of judgment, it will be settled on notice by the judge by whom this opinion is prepared.

ALLEN, J., delivered an opinion to the same effect.

GARDINER, C. J., and RUGGLES, JOHNSON and EDWARDS, Js., concurred.

PARKER, J., was in favor of affirmance, and SELDEN, J., took no part in the decision.

Judgment in accordance with the foregoing opinion.



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McCluskey *against* Cromwell.

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McCLUSKEY *against* CROMWELL and another.

The statute (*Laws of 1850, ch. 278*) requiring a contractor with the state to execute, with sufficient sureties, a bond conditioned that he will pay all laborers employed by him on the work specified in his contract, does not provide for securing the payment of laborers employed in constructing the work by a person to whom it is sub-let by the contractor.

The bond executed pursuant to this statute is security only that the contractor with the state will pay the laborers to whom he shall be indebted.

Where he sub-lets the work, and the sub-contractor hires laborers to perform it and omits to pay them, they cannot sustain an action on the bond for their wages.

Nor can they do so, although the contractor, by the terms of his contract with the state, was bound to perform the work by workmen under his immediate superintendence and not by a sub-contractor, and although the sub-contracting was without the consent of the state or its officers, and the work done by the laborers for the sub-contractor was estimated by the state officers and paid for to the contractor as though done by him.

The rules which should prevail in the construction of statutes, discussed. *Per* ALLEN and RUGGLES, Js.

THE action was commenced in the supreme court, on the 27th of April, 1852. The complaint alleged that in August, 1851, the defendant Cromwell contracted with the canal commissioners of the state of New-York, to construct locks Nos. 108 and 109 on the Black River Canal, and that thereupon he and Utley, the other defendant, pursuant to chapter 278 of the laws of 1850, executed a bond to the people of the state of New-York in the penalty of three thousand dollars, and conditioned that if the said Andrew E. Cromwell, his heirs, executors and administrators, should and did well and truly pay or cause to be paid in full, the wages stipulated and agreed to be paid to each and every laborer employed by him or his agents in the construction of the work, specified in a certain contract for the construction of locks No. 108 and 109, Black River Canal, made between the canal commissioners of the state of New-York, of the first part, and the said Andrew E. Cromwell, bearing date the 18th day of August, 1851, as often as once in each month, during the progress of said work or construction, pursuant to the provisions of an act of the legislature of the state of New-York, passed April

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*McCluskey against Cromwell.*

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10th, 1850, entitled "An act to secure the payment of wages to laborers employed on the canals and other public works of this state," then the said obligation to be void, otherwise to remain in full force and virtue ; which bond was delivered to the canal commissioner having charge of the letting of the contract, and by him filed in the office of the clerk of Lewis county, that being the county in which the locks were to be constructed. The complaint further averred that the plaintiff and a number of other persons, who were named, were, during the months of February and March, and up to April 16, 1852, employed as laborers in the construction of said locks by the defendant Cromwell or his agents, or by those acting under him in the construction thereof, and that their respective work and labor at the wages stipulated therefor amounted to sums which were specified, being in the aggregate \$562.78 ; that each of the other persons named as laborers had assigned and transferred his demand to the plaintiff, and that Cromwell neglected and refused to pay the amount. The defendant Utley made no answer to the complaint. Cromwell answered and denied each allegation of the complaint ; he also, by way of a further answer alleged that he sub-let to one Shippey the construction of the walls of the locks, and that the plaintiff and his assignors were employed by and performed the labor mentioned in the complaint for Shippey. The plaintiff by reply denied the new matter contained in the answer.

The cause was tried before a referee, who found the following facts, viz : That on the 18th of August, 1851, Cromwell entered into a contract with the canal commissioners of the state of New-York, by which he covenanted to construct said locks 108 and 109, for certain prices therein specified. This contract contained the following provision : "and the said Cromwell further agrees to perform the several stipulations of this contract by himself, and workmen under his immediate superintendence, and not by a sub-contract or sub-contractor, except for the delivery of materials." Simultaneously with the making of the contract, Cromwell as principal, and Utley as his surety, executed the bond mentioned in the complaint, conditioned as

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is therein alleged. That on the 2d of September, 1851, Cromwell entered into a written contract with one Shippey, by which the latter agreed to do the masonry on the walls of the locks, and Cromwell agreed to furnish the foundations completed for the walls, to do all necessary bailing, and to pay Shippey a specified price per yard monthly, as the work progressed, less ten per cent which Cromwell was to retain till the work was done, as security for Shippey's performance. No consent was given by the state or any of its officers to this contract between Cromwell and Shippey; nor did the state or its officers, recognize or deal with any one but Cromwell in the construction of the locks, or in paying for the work done thereon. That the plaintiff in this suit, and the several persons named in the complaint, whose demands the plaintiff holds by assignments, were employed by Shippey, in the work done upon said locks under his contract; that they were so employed during the months of February, March, and to the 16th of April, 1852, on which day Shippey absconded, and Cromwell thereafter carried on the work of constructing the locks under his immediate direction; that the wages due to the plaintiff and the other persons named in the complaint, and whose demands were duly assigned to the plaintiff, over and above all payments, amounted at the above named day to the sum of \$562.78; and that the plaintiff and his assignors had no knowledge of the existence of the contract between Cromwell and Shippey. That the work done upon said locks, including the part performed by the labor of the plaintiff and his assignors, was all estimated by the engineers employed on said canal, to Cromwell; and all the moneys paid by the state for the work upon said locks were paid to and received directly by Cromwell, as the contractor therefor.

Upon the facts so found, the referee decided:

(1.) That the spirit and intent of the act of April, 1850, and of the bond required to be given under it, were to provide for the payment of the laborers upon the public works, whether directly employed by the contractor, by an immediate and personal employment, or mediately and by the intervention of a

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*McCluskey against Cromwell.*

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subcontractor; and that the facts proved in this case bring the plaintiff and his assignors within the protection of the statute and entitle him to avail himself of the security of the bond of the defendants, and that on this ground he is entitled to recover.

(2.) That under the circumstances of this case, as between the contractor, Cromwell, and the plaintiff and his assignors, Shippey is to be held and recognized as the agent of Cromwell, in the construction of the work upon which the plaintiff and his assignors were engaged, and on this ground the plaintiff is entitled to recover upon the bond the amount thus earned.

To each of these decisions the counsel for the defendants excepted. The referee ordered judgment in favor of the plaintiff for \$562.78 and interest, which was entered. On appeal this judgment was affirmed by the supreme court, at a general term in the 5th district. The defendants appealed to this court.

*N. Hill, Jr.*, for the appellants.

*F. Kernan*, for the respondent.

W. F. ALLEN, J. The contractor Cromwell was not prohibited by any law from sub-letting the work of constructing the locks agreed to be built by him. But for the provisions of his contract with the canal commissioners he would have been at liberty to perform his undertaking with the state by sub-contractors or by any other instrumentality that he had pleased to employ.

The provision against subletting was inserted by the canal commissioner in his contract, for the reason that it was supposed calculated to promote the interests of the state, and secure the faithful performance of the work, and not with a view to benefit the laborers or material men employed upon it. It was an agreement by the contractor with the state, and not with those who should labor in building the locks; neither was it made really or nominally for the benefit of the latter. As the canal commis-

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sioners were not required by any law or by any duty to the laborers to require the insertion of this provision in the contract, so the agents of the state after the execution of the agreement, and at any time during its performance, without consulting those employed upon the work, or doing them any injustice, could have consented to erase it or expressly waived a compliance with its terms, or acquiesced in a sub-letting in violation of it. By the terms of it, the contractor incurred a duty to the state, but not to the laborers, who in turn acquired no rights under it. What would have been the rights or the proper proceedings on the part of the state upon the breach of the obligation not to sublet, whether they could have annulled the contract or sustained an action, it is not necessary to inquire; it is enough that no rights or remedies would have accrued to the laborers. (*Winterbottom v. Wright*, 10 M. & W. 109; *Thomas v. Winchester*, 2 Seld. 408; *Tollit v. Sherstone*, 5 M. & W. 283.) The contract of the canal commissioners with Cromwell was designed to prescribe and regulate the reciprocal rights and duties of the contracting parties as between themselves, and every covenant and agreement on the part of Cromwell was for the benefit and to protect the interests of the state, while the bond in suit was for the benefit of the laborers, and in it the state as such had no interest. The two contracts had each its separate and distinct functions to perform; in each the contracting parties were different and there was no connection between them, except that the bond in suit grew out of the fact that Cromwell, one of the defendants, had become a contractor upon the public works of the state but the terms of his contract did not enter into or regulate the terms and conditions of the bond, which were fixed and regulated by statute. The terms of the contract of Cromwell throw no light upon and afford no aid in the construction of the defendant's engagement.

The condition of the bond is in substantial conformity with the statute under which it was taken, (*Laws of 1850, ch. 278*), and is to the effect that the said Cromwell "shall and do well and truly pay or cause to be paid in full the wages stipulated and agreed to be paid to each and every laborer em-

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ployed by him or his agent or agents, in the construction of the work specified in a certain contract for the construction of locks Nos. 108 and 109, Black River Canal, made &c., as often as once in each month, pursuant to the provisions of an act of the legislature of this state, passed April 10, 1850, entitled 'An act to secure the payment of wages to laborers employed on the canals and other public works of this state.' The statute provides that public officers letting any contract for work for the state, shall require and take, in addition to the bond now required by law for the security of the state, a bond with good and sufficient sureties, not less than two, conditioned that such contractor shall well and truly pay in full, at least once in each month, all laborers employed by him on the work specified in such contract," &c.

The liability of the defendants depends upon the true construction of their contract, read in the light of the statute in pursuance of which it was made. Whatever may be the liability of Cromwell, the principal, either to the state or to the laborers employed in the construction of the work done, is the liability of Utley, the surety; and consequently the joint liability of both defendants upon their bond cannot be extended beyond the fair import of the undertaking. The principle is well settled, that a surety is not held beyond the fair scope of his engagement, and that in contracts of suretyship, above all other contracts, the meaning of words and phrases is not to be extended to the prejudice of the surety, but that words shall be taken to have been used in their ordinary popular sense. In other words, the liability of sureties is always *strictissimi juris*, and shall not be extended by construction. (*Walsh v. Bailie*, 10 John. 181; *U. States v. Jones*, 8 Peters, 399; *Same v. Boyd & al.* 15 *id.* 187; *Miller v. Stewart*, 9 Wheat. 702, 708.) The bond provides for the payment of the wages stipulated and agreed to be paid to the laborers employed by Cromwell or his agent or agents, and that upon the failure of Cromwell "to pay to each and every of the laborers so as aforesaid employed by him, as is herein provided, then each and every of said laborers to whom the aforesaid Cromwell shall then be indebted, may

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bring an action on this instrument in his or her own name, pursuant to the provisions of the act aforesaid, for the recovery of the amount of such indebtedness." The referee has found that the plaintiff and the other laborers to whose claims the plaintiff has succeeded by assignment, were employed by Shippey, and consequently that they were not employed by Cromwell. Unless therefore the word "employment" means one thing in the judgment of the referee, and another in the undertaking of the parties, the laborers were not employed by Cromwell within the intent of the bond. It is not the labor performed upon the work alone, which gives the laborer rights under the bond, but it is labor done in pursuance of an employment by Cromwell. To employ, is "to engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs;" and when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life. By laborers employed by Cromwell, mentioned in the condition of the bond, are intended those hired by him, working at his request, and under an agreement on his part to compensate them for their services; and employment by Shippey, as found by the referee, in this sense excludes the idea of employment by Cromwell. The plaintiff and his co-laborers were confessedly the servants and agents of Shippey, and could not at the same time and in the same sense be the servants and agents of Cromwell. Shippey was indebted to them upon his contract of hiring, and there being nothing in this case to take it out of the ordinary rule, it follows that Cromwell was not indebted to them upon the same contract. It is not claimed that ordinarily these men could be said in legal or popular parlance to have been employed by Cromwell; and if not, then as against the surety a different effect should not be given to the transaction or to the words used. We are not at liberty, in order to extend the liability of the parties to the bond, one of whom is a surety, to strike out of the condition the words "by him or his agent or agents," so

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that it shall provide in terms for the payment of "each and every laborer employed in the construction of the work," without reference to the employer. The contract thus modified would be entirely different from that actually made by the parties.

The liability of the defendants is made to rest, in the judgment of the referee and of the court below, in part upon a quasi agency of Shippey for Cromwell in the employment of the laborers and construction of the work, and the relation of principal and agent between them is supposed to grow out of the peculiar circumstances and equities of the case. We have seen that no rights result to the laborers from the agreement not to sublet. It was neither criminal, immoral or illegal to perform the work by sub-contractors. It was merely a violation of contract for which the adverse contracting party had a remedy by action or otherwise. It is not necessary to ignore the under-letting and call it an agency, to avoid the presumption or appearance of illegality or criminality. Third persons had no interest in the covenant against underletting, and the relations of the parties were not changed by reason of it, neither did any equities accrue to third persons in consequence of it. The contractor could not have saved himself from the consequences, whatever they were, of subletting, by calling it an "agency." The distinction between a subcontractor and agent is well marked and defined, and the rights and liabilities growing out of the different relations of principal and agent, and contractor and sub-contractor, are equally well understood, and cannot be supposed to have been confounded by the parties to this bond. The distinction is recognized in *Blake v. Ferris*, (1 *Seld.* 48,) and in *Poole v. Palmer*, (9 *M. & W.* 71.) Whenever the relation of master and servant ceases to exist, the liability by virtue of, or growing out of the relation, ceases. The relation of sub-contractor and agent being entirely distinct and incompatible, and the referee having found that in fact Shippey was sub-contractor, and as such employed the laborers, we could not rightfully adjudge that he was the agent of Cromwell, either in contemplation of



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law or of the parties to the contract. Again, the condition of the bond is for the payment of an indebtedness of Cromwell, and such indebtedness cannot be predicated upon an employment by Shippey of servants and laborers to perform for him the work he had undertaken to do for Cromwell, for the compensation and upon the terms agreed upon. Aside from the statute and the bond, it is clear an action would not lie against Cromwell upon any legal liability, or any agreement, express or implied, to pay the laborers employed by Shippey; and if not, then there was no indebtedness by which the obligors became liable by their bond. Their liability is based upon a subsisting legal indebtedness of Cromwell the principal.

But laying out of view the fact that this obligation should be construed as a surety contract, and giving the statute and the bond that reasonable and fair interpretation which their language demand, I can see no ground for asserting the liability of the defendants. We are urged to give these instruments an equitable construction, in view of the supposed equities represented by the plaintiff, and a liberal construction so as effectually to meet the beneficial end which the legislature had in view in the enactment, and prevent a failure of the contemplated remedy. It is beyond question the duty of courts in construing statutes, to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all, in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of

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*McCluskey against Cromwell.*

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either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction, the contracts of parties. The office of interpretation is to bring sense out of the words used, and not bring a sense into them. (*Lieber's Polit. and Le. Hermeneutics*, 87; 2 *Ruth. Inst.* ch. 7, § 2; *Story's Com. on Const.* § 392; *Purdy v. The People*, 4 *Hill*, 384; *Smith's Statutes, &c.* § 478; *Waller v. Harris*, 20 *Wend.* 561.) The rule is well expressed by Judge Johnson, in *Newell v. The People*, (3 *Selden*, 97,) in these words, "Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is, the thought which it expresses. To ascertain this, the first resort in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case, there is no room for construction. That which the words declare, is the meaning of the instrument; and neither courts nor legislatures have the right to add to, or take away from that meaning."

In the statute and bond under consideration, we have a clear and precise provision for an indebtedness of Cromwell to laborers employed by him, in the natural reading of the words in their ordinary and most obvious sense, not needing and not admitting of any interpretation. To this extent they interpret themselves. This one class of cases is provided for, and it is now sought to embrace another and distinct class of cases, another set of laborers, upon the doctrine of equitable construction. If the statute and undertaking could have no effect except by resort to this liberal construction and extended application of these terms, there would be more reason to resort to conjecture to ascertain the meaning of the framers of the instruments. But full effect can

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be given to the instruments without the unnatural and forced construction sought to be engrafted upon them, and therefore one *true sense* being given to the words, and that being the apparent and obvious sense, within well settled rules of legal hermeneutics, we cannot properly seek for another sense. (*Lieber, ut supra*, 86.) As we have seen, the natural and obvious meaning of the statute and obligation is to secure the payment of the indebtedness of Cromwell to laborers employed by him; and the claim sought to be brought by construction within the benefit of the statute and of the agreement, is an indebtedness of Shippey to laborers employed by him, an entirely different matter. Perhaps had the case of sub-letting occurred to the legislature, they would have also provided for it, and perhaps had Utley been requested to become security for Shippey's debts, he would have done so; but neither has been done, and the courts can neither usurp the functions of the legislature, by doing or assuming as done what they may think should have been done in the way of legislation, or take the place of contracting parties, and vary the terms of their agreements to meet any supposed equities. The cases of *King v. Bird*, (2 B. & Ald. 52,) *Donaldson v. Wood*, (22 Wend. 395,) decided in the court for the correction of errors, and *Millered v. The Lake Ontario, Auburn and New-York Railroad Co.*, (9 How. Pr. R. 238,) are all analogous in principle, and decided upon the rules of legal interpretation which we have sought to apply to this case; and if the principles upon which these cases were decided are sound, as we believe them to be, they, with the reasoning of the chancellor in 22 Wendell, and of Judge Selden in 9 Howard, apply with full force to the case before us, and are conclusive against the right of the plaintiff to recover.

The judgment of the supreme court must be reversed and a new trial granted, costs to abide the event.

GARDINER, C. J., JOHNSON, PARKER and SELDEN, Js., concurred in the foregoing opinion. DENIO, J., having been counsel in the cause, took no part in the decision.

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RUGGLES, J., (dissenting.) This action is brought on a canal contractor's bond to the people of this state, taken in pursuance of the statute passed April 10th, 1850, entitled "An act to secure the payment of wages to laborers employed on the canals and other public works of this state." The facts are stated in the special report of the referee.

The first section of the act of 1850 makes it the duty of the officer having charge of the letting of any of the canals or other public works of this state to require and take, in addition to the bond required for the security of the state, a bond with sureties, "conditioned that such contractor shall well and truly pay in full, at least once in each month, all laborers employed by him, in the mode specified in such contract." The defendants now insist that they are not liable on the bond because the plaintiff and his assignors were hired by Shippey, the sub-contractor, and therefore, as they contend, were not *employed* by Cromwell, the contractor, within the meaning and intent of the statute.

In construing a statute, courts must never lose sight of its object and intent. Statutes are to be expounded according to the ordinary sense of the words, unless such construction would be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be modified, restricted or extended to meet the plain policy and purview of the act. But in such case the intent must be obvious and must be collected from the words of the act. Courts will not attempt to mould the language of an act for the sake of an apparent convenience, and without the clearest evidence of a corresponding intention in the legislature. In interpreting the law judges are to explore the intentions of the legislature, yet the construction to be put upon a statute must be such as is warranted by, or at least not repugnant to, the words of the act. Where the object of the legislature is plain and unequivocal, courts ought, without violence to the words, to adopt such a construction as will best effectuate the intentions of the lawgiver. (*Dwarris on Statutes*, 582, 3, ed. of 1848.) And where words are ambiguous,

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or where they are such as to admit of two senses, the courts will read and interpret them in that sense which will carry the manifest intention of the legislature into effect. (*Dwaris*, 588.)

The object and intent of the act in question are obvious, plain and unequivocal. They are expressly declared in the title of the act already recited; and every section and portion of the act relate to the object and purpose expressed in the title. Before the statute was passed, it had frequently happened that laborers who actually performed the work, were defrauded of their wages by the contractors. The object of the act was to remedy this evil. It may be so construed as to embrace the plaintiff's case without the perversion or distortion of any of its language. The question arises upon the use in the statute of the words "employed by him," the contractor. They were in fact hired by Shippey. But "hiring" and "employing" are words of different meaning. To hire is to engage in service for a stipulated reward; as to hire a servant for a year, or laborers by the day or month; to engage a man to temporary service for wages. To employ is a word of more enlarged signification. A man hired to labor is employed, but a man may be employed in a work who is not hired. Materials are employed for building locks, but they are not hired; and a man who does his own work or the work of another is employed in it, although he receives no wages. To employ, is to use as an instrument or means of effecting an object. This is one of the senses in which the word is commonly and frequently used, and in that sense the sub-contractor and all his laborers were employed by Cromwell; they were used by Cromwell as the means by which he caused the work to be done; although none of them, strictly speaking, were hired by him. We are bound to read and understand the words "employed by him," used in the statute and in the bond, in that sense which will suppress the mischief and advance the remedy contemplated by the law. According to the legitimate import of the words of the first section, the plain-

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*McCluskey against Cromwell.*

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tiff's case is not only within the spirit of the law, but within its letter.

But it is contended that the third section requires that we should give the act a different construction, and limit the liability of the defendant to the laborers actually hired by him, and who could recover against him on his contract of hiring. That part of the third section referred to by the defendant's counsel, is in these words: "The bringing of a suit by one or more laborers upon such bond, shall not operate as a bar to bringing other suits thereon by any of the parties for whose benefit such bond was taken, and to whom such contractor shall be indebted for labor."

I am inclined to the opinion that Cromwell was legally indebted to the laborers, for work done upon his job. He was the contractor with the state. He was prohibited by his contract from underletting, but nevertheless he did underlet a part of the work to Shippey. This underletting was however concealed from the laborers. Cromwell retained a portion of the work to be done under his own direction and superintendence, and this must be presumed to have been so done. Cromwell received from the state the money the laborers earned. From the nature of the transaction and the course of the business, the fact of his being the contractor must have been known to the laborers; and to all outward appearance Shippey was acting not as a sub-contractor, but as the agent of Cromwell in the prosecution of the work. Under these circumstances the laborers must be presumed to have dealt with Shippey, under the belief that he was Cromwell's agent, although the hiring was in Shippey's name. The contract between Shippey and the laborers was not in writing; and it does not appear that they gave exclusive credit to Shippey, the ostensible agent. Cromwell permitted the laborers to go on with their work under the supposition that they were entitled to look to him as Shippey's principal. He misled them by concealing the fact that Shippey was a sub-contractor; and having done so, he would not be at liberty to set up that

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fact as a defense to an action against him as Shippey's principal, in an action for the laborers' wages. I think therefore that he was indebted to the laborers hired by Shippey, within the meaning of the third section of the statute of 1850.

But again, suppose the construction which the defendant puts upon the statute be so far correct, that in the absence of fraud, concealment or bad faith, the liability of the defendant on his bond would be limited to the laborers actually hired by him, there are further substantial reasons why he ought to be precluded from setting up the defense he relies on.

The sub-letting and its concealment were not only a violation of his contract, but they were a fraud upon the state, and upon the laborers. The statute was intended for the protection of all the laborers upon the public works ; and the bond given in pursuance of it would have been an effectual protection to the plaintiff and his assignors, if this fraud had not been practiced. The sub-letting was a fraud upon the state, because it enabled the defendant, as contractor, to obtain money from the treasury to which he was not entitled. If the defendant's construction of the statute be correct, it was the duty of the auditor of the canal department, immediately upon notice of the sub-letting, to withhold the payments for the work until the canal commissioner should consent to the sub-letting, and adopt the sub-contractor in lieu of the defendant ; and in that event, still further to withhold payment, until the new contractor should give the security to the laborers required by the act of 1850. It is the duty of the state officers to give effect to this statute according to its manifest intent ; and not to permit any contractor to escape from his liability on his bond to the laborers on his job. There is no proof that any of the state officers had notice of the sub-contract between Cromwell and Shippey ; and it is to be presumed that they had no such notice ; because if they had they would in the course of their duty have withheld the payments to Cromwell ; and a neglect of that duty is against legal presumption. If the fraud had not been practiced, the laborers would have had an un-

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doubted remedy; and it is only through the instrumentality of this fraud that the defendant can make his defense available. Nothing is better established in the law than that a party shall not be permitted to allege his own fraud as the ground of an action or a defense. Cromwell should be precluded from setting it up. The case ought to stand on the same footing as if there had been no sub-contract, and as if the laborers had been hired by Cromwell. The judgment below ought to be affirmed.

EDWARDS, J., concurred in the foregoing opinion.

Judgment reversed.

NOTE.—In the case of Robertson against Bullions, reported at page 243, ante, JOHNSON, J. dissented from the second proposition stated in the close of the opinion of SELDEN J., but he concurred in the other propositions stated by SELDEN, J.

[THE REMAINDER OF DECEMBER CASES IN NEXT VOLUME.]



# INDEX.

## A

### ABSCONDING, CONCEALED AND NON-RESIDENT DEBTORS.

1. Notwithstanding the statute, (2 R. S. 18, § 92,) as to the effect of the appointment of trustees in proceedings by attachment against absconding and concealed debtors, any person sought to be affected by their appointment may raise the question that the officer appointing them had not, on the face of the proceedings, jurisdiction to issue the attachment. *Van Alstine v. Erwine*, 831
2. It is a compliance with the statute, (2 R. S. 3, § 4,) requiring the application for an attachment to be verified by affidavit, if the affidavit is indorsed upon and details all the material facts contained in the application, although, in terms, the affidavit does not refer to it. *id*
3. Where it is doubtful whether the debtor has departed from the state, or keeps concealed therein, with the intent specified in the statute, the application for an attachment is sufficient, if it charge in the disjunctive that he has done the one or the other. *id*
4. So the application may charge that the *intent* of the debtor was to defraud his creditors, or to avoid the

service of civil process, where it is doubtful which was his purpose. *id*

5. Every witness not a party to or apparently connected with a proceeding or issue, is to be deemed free from interest therein till the contrary is proved. *Per DENIO, J.* *id*
6. Affirmative proof need not be given on an application for an attachment, that the witnesses, who verify the facts and circumstances to establish the grounds of the application, are disinterested. *id*
7. Nor in a suit between the trustees and third persons, as to property claimed by them as such, can the jurisdiction of the officer to issue the attachment, be impeached by extrinsic evidence that these witnesses had a disqualifying interest. *id*

### ACCOUNT STATED.

1. An account stated is conclusive upon the parties, unless impeached for fraud or mistake. *Lockwood v. Thorne*, 170
2. To make an account stated, it is sufficient that the account has been examined and assented to as correct by both parties. This assent may be express, or implied from circumstances. *id*

3. Whether on a given state of facts the transaction constitutes a stated account, is a question of law. *id*

4. As a general rule, where an account showing a balance is duly rendered, he to whom it is rendered is bound, within a reasonable time, to examine the same and object if he dispute its correctness. *id*

5. If he omit to do so, he will be deemed, from his silence, to have acquiesced, and be bound by it as an account stated. *id*

6. Where T. & Co., a firm in New-York, on the first of February, 1847, pursuant to custom, rendered to L. & Co., a firm in Ulster county, an account of their mutual dealings, containing a charge against the latter of \$880.48, and showing a balance due them of \$5628.41; and L. & Co., on the 17th of February drew on T. & Co. for an amount corresponding with this balance, which was paid, and made no objection to the account till November following, when they brought a suit to recover the amount of the \$880.48, claiming that it was improperly charged to them; *Held*, that they could not recover without proving affirmatively mistake or fraud in the account rendered. *id*

#### ACTION ON THE CASE.

1. The corporation of the city of New-York, which had ordered a street to be graded and contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor in performing the work. *Kelly v. The Mayor &c. of New-York*, 432

2. The rule is not otherwise, although the contract provides that the work shall be done under the direction and to the satisfaction of certain officers of the corporation. *id*

#### ADMINISTRATORS.

*See* EXECUTORS AND ADMINISTRATORS.

#### ADVERSE POSSESSION.

*See* PRESCRIPTION.

#### AGREEMENT.

*See* PLANK ROAD COMPANIES, 13, 15.

#### AMENDMENTS.

Where the complaint omitted to aver a fact essential to the maintenance of the action, but this fact appeared from the defendant's answer, and objection to the complaint on account of this omission was first taken at the trial, when it was overruled and judgment rendered in favor of plaintiff, and defendants appealed to this court; *Held*, that this court would deem the defect in the complaint supplied by amendment, and sustain the judgment. *Bate v. Graham*, 237

*See* VARIANCE.

#### APPEAL.

1. An application by petition to the supreme court, under the statute to compel a specific performance by infant heirs of a contract for the sale of land made by the ancestor, is a special proceeding within section eleven of the code of procedure. *Hyatt v. Seeley*, 52

2. An appeal lies to this court from a final order affecting a substantial right made by the supreme court at general term upon such an application. *id*

3. This court cannot review those parts of a decree of the supreme court not appealed from. *Robertson v. Bulions*, 243

4. The supreme court has not power to relieve a party from an omission to appeal to the general term from a judgment within the time prescribed by law. *Per DENIO, J. Humphrey v. Chamberlain*, 274

5. Nor should it attempt to do so by ordering the judgment to be set aside and re-entered as of a subsequent date. *Per DENIO, J.* *id*

6. But where such an order was made at a special and confirmed at a general term of the supreme court; *Held*, that no appeal would lie from the same to this court. *id*

7. Section 11, subdivision 8, of the code contemplates an order made in a proceeding based upon a judgment and assuming its validity. *id*

8. An appeal does not lie to this court from an order of the supreme court made at a general term, confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act, and refusing to direct a new appraisal. *New-York Central Railroad Co. v. Marvin*, 276

9. This court has jurisdiction to review an order made by the supreme court, vacating a judgment entered by confession, on account of a defect in the statement. *Belknap v. Waters*, 477

10. Where a judgment was entered by confession, and the supreme court, on the application of another creditor of the judgment debtor, made an order, at special term, vacating the judgment, which order was affirmed at general term, and the plaintiff in the judgment appealed to this court; *Held*, that the appeal would lie. *id*

11. Since the enactment of the code of procedure it is not requisite, in order to review questions of law arising upon the trial, that the exceptions taken should be signed or sealed by the justice before whom the trial was had, or that a bill of exceptions be made. *Zabriskie v. Smith*, 480

12. Where, on an appeal to this court, it appears by the return that the exceptions were taken at the trial and separately stated, it is not necessary that they should be authenticated by the justice who tried the cause, or the court below. *id*

13. But where the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising upon them, the party desiring a review in this court should procure the exceptions to be separated from the case by or under the direction of the court be-

low, or a justice thereof. *Per* JOHNSON, J. *id*

14. If it does not appear from the return that the exceptions were in the first instance stated separately, or that they were separated from the case in which they were originally stated under the direction of the court below or a judge thereof, the appeal to this court will be dismissed. *Per* JOHNSON, J. *id*

*See* PRACTICE, 6 to 9.

## APPRAISAL

[*Of lands taken by Railroads.*]

*See* APPEAL, 8.

## ASSESSMENT OF TAXES.

*See* TAXES, 8 to 5.

## ASSESSORS.

*See* TAXES, 8 to 6.

## ASSIGNMENTS

[*For the benefit of Creditors.*]

*See* FRAUDULENT CONVEYANCES.

## ATTACHMENTS.

*See* ABSCONDING, CONCEALED AND NON-RESIDENT DEBTORS, 2 to 6.

## ATTORNEYS AND SOLICITORS.

1. The rule of law making attorneys liable for the fees of certain officers, should not be extended by analogy. *Judson v. Gray*, 408

2. Referees do not belong to the class of officers to whom attorneys and solicitors have been held personally responsible for services rendered in the suit; and therefore *held*, that the solicitor for the complainant in a chancery suit was not personally liable to a referee, appointed by the court under the judiciary act of 1847, to take and

state an account in the cause, for his fees. *id*

## B

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An officer of a corporation, to whose order, as such, a note executed to it is payable, and who indorses the note, adding to his name his official character, and negotiates it on behalf of the corporation, is not personally responsible as indorser. *Babcock v. Beman*, 200
2. The effect of such indorsement is merely to transfer the paper. *id*
3. Where a note was payable to the order of "R. Beman, Treas." and he being the treasurer of a corporation with authority as such to receive and transfer the note, indorsed it "R. Beman, Treasurer," and delivered it to the plaintiffs, who received it on account of a debt due them from the corporation, with notice of the capacity in which Beman acted; *Held*, that he was not individually liable as an indorser of the note. *id*
4. A bank receiving and upon good consideration assuming the collection of a bill or note, is liable for any default of its agents or correspondents in collecting or paying over the proceeds, or in charging the parties thereto, unless there be an agreement to the contrary. *Commercial Bank of Penn. v. Union Bank of New-York*, 203
5. A bank to which a bill is indorsed and transmitted by the owner for collection, and which has a special interest in the draft and proceeds, can sustain an action against an agent employed by it to collect the same for default in paying over the proceeds or in charging the parties. *id*
6. It is sufficient that the draft was indorsed to such bank, and it agreed with the owner to collect it, to enable it to sustain the action against an agent employed by it to collect the same. *Per ALLEN, J.* *id*
7. Where the Bank of Wilmington was the owner of a bill of exchange payable at sight at Troy, and indorsed

and transmitted it to the plaintiff under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and with the same redeemed the circulating notes of and paid drafts drawn by the Bank of Wilmington; and the plaintiff indorsed and transmitted the bill to the defendant, its correspondent in New-York, for collection, and the same was by the latter sent to the Troy City Bank for the same purpose; *Held* that the plaintiff could recover of the defendant the amount of the bill if collected by the Troy City Bank, or if the same was lost by the omission of the latter to charge the drawer and indorsers. *id*

8. The bill was received by the Troy City Bank, on Friday morning the 19th of Nov., and was then presented to the drawee and delivered to him on receiving his check on that bank for an amount exceeding the bill, and the difference between the check and the bill was paid him. The drawee had not funds in the bank to the amount of the draft when it was delivered to him and his check received, but on the evening of the same day he made his account good to the amount of this and other checks drawn during the day, by cash and sight drafts on New-York. On the 20th he drew checks on the bank which were paid to a large amount, and made his account good in the evening by cash and drafts on New-York. These drafts were never paid, and amounted to more than the bill. On Monday the 22d, the Troy City Bank procured the bill from the drawee and demanded payment of the same, protested it for non-payment, and served notice of non-payment on the drawer and indorsers: *Held* that the defendant was liable for the amount of the bill: that if it was not paid, there was an omission to charge the drawer and indorser. *id*
9. A note, delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or himself, has no legal inception in his hands. If he negotiate the note upon an usurious consideration, it is void. *Catlin v. Gunter*, 368

See CHECKS.  
USURY.

## BILL OF EXCEPTIONS.

See PRACTICE, 4 to 9.

## BOND.

See LABORERS ON PUBLIC WORKS.

## C

## CANALS.

See CONSTITUTIONAL LAW, 4 to 7.

## CHECKS.

In a suit against a bank for money deposited with it by the plaintiff, the defendant produced a check upon the bank, which it had paid, for the amount of the money, signed by the plaintiff and payable to the order of Corlies & Co., and with the name of this firm written upon it; it was proved that this was not the indorsement of the firm, and that it never owned or had any interest in the check; *Held*, that the plaintiff was entitled to recover. *Morgan v. The Bank of the State of New-York*, 404

## COLLISION.

See INSURANCE, 2.

## COMMISSION TO EXAMINE WITNESSES.

See DEPOSITION, 9, 10.

## COMMISSIONERS OF HIGHWAYS.

See PLANK ROAD COMPANIES, 9 to 12, 16.

## COMMON CARRIERS.

1. Where there is no special contract as to the liability of a common carrier of property, he is responsible for all loss or damage except that which is caused by the act of God or the pub-

lic enemy. *Dorr v. The New Jersey Steam Navigation Co.* 485

2. He cannot limit this liability by notice, even if it be brought to the knowledge of the owner. *id*

3. But common carriers may limit their liability by an express agreement with the owner. *id*

## CONDITION.

See DEED, 2, 3, 8 to 10.

PLANK ROAD COMPANIES, 18, 14,

## CONDITION PRECEDENT.

See CONTRACT, 1 to 4.

## CONSTITUTIONAL LAW.

1. The act exempting certain property from levy and sale on executions, (*Stat. of 1842, p. 198.*) applies to judgments and executions on debts contracted before as well as after its passage. *Morse v. Gould*, 281

2. This act merely modifies the remedy for enforcing contracts, and neither destroys it or substantially impairs its efficiency. Therefore it does not conflict with the provision of the United States, forbidding any state to pass a law impairing the obligation of contracts, and is valid. *id*

3. The judgment of this court in *Danks v. Quackenbush*, (1 *Conn.* 129,) is not obligatory as a precedent, the members of the court having been equally divided in opinion on that case. *id*

4. The legislature had authority to pass the law (1 *R. S.* 226, § 49,) enacting that where premises had been appropriated to the use of a canal, no claim for damages therefor should be received by the appraisers, or paid, unless exhibited within a year after the law took effect, and that such premises should be deemed the property of the state. *Roxford v. Knight*, 308

5. This law does not conflict with the constitution of the United States. Nor

did it violate the provision of the constitution of this state, forbidding the taking of private property for public use without just compensation. *id*

6. The title to premises which were appropriated to the use of the state canals, at the time this law took effect, is in the state. The state acquired an estate in fee in such premises. *id*
7. Upon an abandonment of their use for the purposes of a canal, the premises do not revert to the former owner; title to the same continues in the state. *id*

#### CONSTRUCTION OF WRITTEN INSTRUMENTS.

See CONTRACT, 2, 3, 10.  
DEED, 1, 8.  
INSURANCE, 6 to 10.

#### CONTEMPT OF COURT.

See SURREGATE'S COURT, 3 to 6.

#### CONTRACT.

1. A condition precedent must be strictly performed, to entitle a party to recover. *Oakley v. Morton*, 25
2. Where, by a contract under seal, O. agreed that he would keep twenty cows during the season for the dairying business, and sell the butter made from said dairy of cows to M., to be delivered at a time and place specified, at a price per pound named, and M. agreed to pay for the butter to be delivered; and O. at the commencement of the dairy season put twenty cows on his farm, from which butter was made until the end of the season, which was about the middle of November, except that three of the cows, about the first of September, and two of them about the middle of October, ceasing to yield more than about a quart of milk each per day, and to be of much value for dairy purposes, were respectively sold at those dates; *HELD*, that O. could not sustain an action on the contract. *id*
3. By the contract, O. was required to keep during the season twenty milk cows, and when any of those provided ceased to yield milk, it was his duty to procure others within a reasonable time. *Per ALLEN and JOHNSON, Js.* *id*
4. Where a person by his contract engages to do an act, performance is not excused by an inevitable accident. *Per ALLEN, J.* *id*
5. Where a party seeks to enforce in the courts of this state a contract which by its laws is forbidden and declared void, he must aver and prove where it was made, and that by the laws of that place it was authorized and valid. *Thatcher v. Morris*, 437
6. Where in a suit to recover prize money drawn by tickets owned by the plaintiff in a lottery alleged to be authorized by and established pursuant to the laws of Maryland by the defendants, and drawn at Baltimore, the complaint did not state where the tickets were sold or purchased by the plaintiff; *Held*, on demurrer, that the complaint did not state a cause of action enforceable in the courts of this state. *id*
7. Where one party proposes by mail a contract with another residing at a distance, and the latter accepts it and deposits his acceptance in the post office, addressed and to be transmitted to the former, the contract is complete. *Vassar v. Camp*, 441
8. The party may make it a condition that the proposed contract shall not be obligatory upon him until he receives notice of its acceptance, or unless he receives such notice by a specified time; but if he do not, the contract is binding on him from the time the acceptance is deposited for transmission to him by mail, although he never receive it. *id*
9. Where merchants residing at Sacket's Harbor forwarded by mail to brewers at Poughkeepsie a proposed contract, signed by the former, to purchase and deliver to the latter barley, with a counterpart to be signed and returned by them, if they accepted the proposal, and the latter, on the receipt of the pro-

posed contract, accepted it and signed the counterpart and deposited it in the post office at Poughkeepsie, in a letter of acceptance directed and to be transmitted by mail to the former at Sacket's Harbor; *Held*, that the deposit of the acceptance and counterpart in the post office consummated the contract, and that it was obligatory on the parties making the proposal, although they never received the acceptance. *id*

10. Where a party by an instrument in writing signed by him, and dated the 16th of September, 1839, for value received, agrees to purchase of another at the expiration of one year from the date of the instrument, stock at a price named, the sale and transfer of the stock and the payment of the price are dependent acts to be concurrently performed. *Lester v. Jewett*, 453

11. To entitle the vendor to recover upon the agreement, he must aver and prove a tender, or offer to sell and transfer the stock to the party contracting to purchase, at the expiration of the year. *id*

12. A count averring that he was ready and willing to sell and transfer the stock at the time named therefore in the instrument, is bad on demurrer. *id*

13. But a count upon the agreement which averred that the vendor was ready and willing, and at the expiration of one year from the date of the instrument, to wit, on the 7th of September, 1840, offered to the purchaser to sell and transfer to him the stock, is sufficient. *id*

## CORPORATIONS.

*See* ACTION ON THE CASE.

NEW-YORK CITY.

PLANK ROAD COMPANIES, 1, 2, 7, 8, 9.

RELIGIOUS SOCIETIES.

STOCKHOLDERS.

## COURTS OF EQUITY.

*See* INFANTS, 1, 2, 5 to 10.

RELIGIOUS SOCIETIES, 11, 12.

## COURTS OF JUSTICE OF THE PEACE.

1. 'A justice of the peace was not authorized by the revised statutes to issue an execution after two years from the rendition of the judgment. *Morse v. Gould*, 281
2. But where an execution was duly issued and returned unsatisfied, he had power to renew it after the two years had elapsed. *id*

## COVENANT.

*See* DEED, 8.

## D

## DAMAGES.

In an action against several persons for an assault and battery, the damages are not divisible; and should the jury erroneously assess different amounts against the defendants, the plaintiff should have judgment against all who are convicted, for the largest amount found against any one. *Per DENIO and PARKER, Js. Beal v. Finch*, 128

*See* SLANDER.

## DECLARATIONS.

*See* EVIDENCE, 1 to 7, 9.

## DEED OF INFANTS' LANDS BY GUARDIAN.

[*Form and Manner of Execution.*]

*See* SPECIFIC PERFORMANCE, 1 to 7.

## DEED.

1. To authorize several instruments executed at the same time, to be construed together as constituting one contract or conveyance, they should be between the same parties. *Per SELDEN, J. Craig v. Wells*, 315
2. Conditions in grants are not favored by the law, and hence must be clearly expressed. *id*

3. No particular words are requisite to create a condition, but they must clearly import that the vesting or continuance of the estate is to depend upon the supposed contingency. *id*
4. A reservation is never of a part of the thing granted, but of something issuing or created out of it. *id*
5. An exception must be of a portion of that which is included by the general description in the grant. *id*
6. A prohibition of the use of property granted inconsistent with the title conveyed, is void. *id*
7. A valid restriction of the use of property conveyed may be imposed by a condition upon, or covenant of the grantee. *Per SELDEN, J.* *id*
8. M. being the owner of premises situate on both sides of the Walkill, with mills situate thereon propelled by its waters, by separate deeds executed at the same time, conveyed to his son G., in fee, land with a grist mill, &c. thereon, situate on the east side of the stream, and to his son W., in fee, land on the west side, with a fulling mill, &c. thereon; the deed to G. contained a clause *excepting and prohibiting* the right of carrying on upon the premises granted to him, the business of fulling or dressing cloth, &c., and also the right of using the water of the stream for any purpose other than grinding grain, when the same should be necessary or useful to W., his heirs, &c., for the fulling, &c. of cloth upon the premises conveyed to him by M., by deed of even date; the deed to W. contained a clause *excepting and prohibiting* the right of using the waters of the Walkill for turning any wheel not used or useful in fulling, dyeing or dressing cloth. Simultaneously with the execution of these deeds, G. and W. executed each to the other his bond, conditioned for the observance of the exceptions and prohibitions contained in his respective deed. Subsequently W. conveyed his premises by deed, containing no restrictions as to the use of the water, and his grantee converted the fulling mill into a grist mill, and used the water of the stream to propel it. On bill, filed by the heirs of G. to restrain him from so using the water, *Held*, 1. That as against the defendant the deeds and bonds were not to be construed together as forming one instrument. 2. That the clause in the deed to W. restricting the use of the water, did not create a condition, exception or reservation. 3. That it could not be construed as a covenant, limiting the use of the property conveyed. 4. That this clause was a mere prohibition of the use of the thing granted, and as such void. *id*
9. A naked condition inserted in a grant, does not create any agreement on the part of the grantee accepting the thing granted, to perform the condition. *Palmer v. Fort Plain and Cooperstown Plank Road Co.* 376
10. In such a case, specific performance cannot be enforced by action. The remedy for a breach of the condition is by a proceeding to recover the thing granted. *id*

## DEPOSITION.

1. A motion at the trial to suppress the whole of a deposition, on the ground that some of the interrogatories and parts of the deposition are improper, should be denied. *The Commercial Bank of Pennsylvania v. The Union Bank of New-York*, 205
2. If any part of the deposition is competent, the objection should be confined to that which is not so. *id*
3. Where pertinent evidence is given in answer to the general interrogatory, to which the attention of the opposing counsel was not called by the others, if he desire to cross-examine the witness as to such evidence, he should apply to the court for relief before the trial. *Per ALLEN, J.* *id*
4. It is not a ground for suppressing the whole deposition on the trial. *id*
5. If any part of the evidence so given is incompetent or impertinent, such part may be excluded. *id*



6. Witnesses may be examined on commission as to an original paper, by annexing a copy to the interrogatories for the purpose of reference, description and identification, and producing the original on the examination of the witness. It is not indispensable that the original be annexed to the interrogatories. *Per ALLEN, J.* *id*

7. The refusal to suppress the deposition of a witness at the trial, where it was proved that the attorney of the party examining him, at the request of the witness and before he was sworn, wrote down for him at his dictation the substance of what he afterwards testified to in answer to the interrogatories, is not error; it goes to the credibility of the evidence. *id*

8. If the witness was imposed upon, or any fact was misstated, colored or concealed, the court, on motion for that purpose, might set aside the deposition and order the commission to be executed anew, or grant other appropriate relief. *Per ALLEN, J.* *id*

9. Where the direction as to the return of a commission required it to be enclosed in a wrapper, and deposited in the post office at Toronto . . . by the commissioners, directed to W. B., Buffalo, "and a certificate thereof indorsed upon the wrapper by the commissioners," and the commission was received from the post office at Buffalo, post marked Toronto; *Held*, that it was not requisite that the certificate on the wrapper should state that the commission was deposited in the post office by the commissioners. *Brumskill v. James*, 294

10. Where notes, offered in evidence as proved by a witness examined on commission, were attached to and returned with his deposition, were marked A and B, and had the names of the witness and the commissioners written upon them; and the witness in the deposition described the notes to which he testified, by dates, amounts, &c. corresponding with those of the notes offered, and stated that they were

produced to him on his examination, marked A and B, and that he then wrote his name upon them; and the commissioners in their return certified that the notes attached to the deposition were produced to the witness on his examination, and he signed his name thereon in their presence; *Held*, that the notes offered in evidence were sufficiently identified as those testified to by the witness. *id*

# DISCOVERY OF BOOKS AND PAPERS.

1 The supreme court is authorized by the revised statutes (2 R. S. 199) to compel a defendant in a suit pending therein to make discovery of books, papers and documents in his possession or power relating to the merits thereof, and which are necessary to the plaintiff to enable him to prepare for the trial. *Gould v. McCarty*, 575

2. The 388th section of the code is not a substitute for the provisions of the revised statutes, but is auxiliary thereto. *id*

3. The superior court of the city of New-York has the same powers to compel discovery by the parties to a suit pending therein, which are conferred by the revised statutes upon the supreme court; (*Laws of 1841, p. 22*;) and where the defendant, in an action pending in that court, refused to comply with an order directing him to make discovery, to enable the plaintiff to prepare for trial; *Held*, that the court was authorized to strike out his answer, and render judgment as though no answer to the complaint had been made. *id*

# DIVORCES.

*See* MARRIAGE.

# DOWER.

*See* MARRIAGE, 6.

## E

## ECCLESIASTICAL CORPORATIONS.

See RELIGIOUS SOCIETIES, 9, 10.

## EQUITABLE CONVERSION.

See INFANTS, 8 to 10.

## ERROR.

The court will not reverse a judgment for an erroneous refusal to nonsuit where the defect in proof is supplied during the trial. *Per* JOHNSON, J. *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 102

## ESTOPPEL.

1. A party is not estopped from denying that an officer had power to sell his property under an execution, unless it appear that acting with knowledge of the facts invalidating the power, he misled the purchaser. *Carpenter v. Stilwell*, 61
2. A judgment record in an action of trespass, in which the declaration alleged that the defendant wrongfully entered and felled timber in a close of the plaintiff, describing it by metes and bounds and as containing about one hundred acres, and the plea was that the part of the close in which the supposed trespasses were committed was the soil and freehold of the defendant, upon which issue was taken and there was a verdict and judgment in favor of the plaintiff, is not evidence that the title to the entire close was in question and adjudged to be in the plaintiff. *Dunkel v. Wiles*, 420
3. It is evidence that title to the part only of the premises which came in question was found and adjudicated in favor of the plaintiff. What part this was must be proved *aliunde*. *id*
4. In a subsequent suit between the same parties or their privies, as to the title to a particular part of the

land embraced within the description of the close, the party setting up the former recovery as an estoppel must prove affirmatively that the title as to this particular part was in controversy and passed upon in that suit. *id*

See PLANK ROAD COMPANIES, 4.

## EVICTION.

See LANDLORD AND TENANT, 1 to 5.

## EVIDENCE.

1. Upon a question of revocation of a will, no declarations of the testator are competent evidence except those which accompany the alleged act of revocation. *Per* SELDEN, J. *Waterman v. Whitney*, 157
2. They are received as a part of the *res gesta* and to show the intent with which the act was done. *Per* SELDEN, J. *id*
3. Where a will is disputed on the ground of fraud, duress, imposition or other like cause not drawing in question the testator's mental capacity at the time of its execution, neither his prior or subsequent declarations are evidence. *Per* SELDEN, J. *id*
4. But where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence which involves his mental condition at the time it was executed, his subsequent statements touching the disposition of his property and inconsistent with the will, in connection with other evidence tending to prove a want of mental capacity, are competent. *id*
5. *Semble*, that on these issues his declarations, made before the will was executed, are evidence under the same restrictions and for the same purpose. *id*
6. Such prior or subsequent declarations are competent evidence on these questions, only as tending to prove the testator's mental condition when the will was executed. *id*

7. When from the remote period at which the declarations were made, or other cause, they do not legitimately bear upon the state of the testator's mind when the will was made, they should be excluded. *Per Selden, J.* *id*

8. Where there was no direct evidence that an usurious agreement was made at the time of the loan; but it was proved that twenty-two days thereafter the borrower paid and the lender received for the use of the money, from the time of the loan to that day, a sum equal to interest at the rate of much more than seven per cent per annum; *Held*, that it was a question for the jury whether or not the loan was made upon an usurious agreement. *Callin v. Gunter*, 368

9. Upon the question, whether the plaintiff, in an action for an injury to his person, was seriously injured, his complaints of pain and distress at the time of the alleged injury, are competent evidence in his own behalf, in connection with other testimony, of his condition. *Caldwell v. Murphy*, 416

10. A judgment record in an action of trespass, in which the declaration alleged that the defendant wrongfully entered and felled timber in a close of the plaintiff, describing it by metes and bounds and as containing about one hundred acres, and the plea was that the part of the close in which the supposed trespasses were committed was the soil and freehold of the defendant, upon which issue was taken and there was a verdict and judgment in favor of the plaintiff, is not evidence that the title to the entire close was in question and adjudged to be in the plaintiff. *Dunkel v. Wiles*, 420

11. It is evidence that title to the part only of the premises which came in question was found and adjudicated in favor of the plaintiff. What part this was must be proved *aliunde*. *id*

12. In a subsequent suit between the same parties or their privies, as to the title to a particular part of the

land embraced within the description of the close, the party setting up the former recovery as an estoppel must prove affirmatively that the title as to this particular part was in controversy and passed upon in that suit. *id*

*See* ACCOUNT STATED.  
RELIGIOUS SOCIETIES, 15, 16.  
WITNESS, 2.

## EXCEPTIONS IN A GRANT.

*See* DEED, 5, 8.

## EXCEPTIONS AT THE TRIAL.

*See* APPEAL, 11 to 14.  
PRACTICE, 1, 4 to 9.

## EXECUTION OF A POWER.

*See* POWER.

## EXECUTIONS.

*See* COURTS OF A JUSTICE OF THE PEACE.  
SHERIFF, 1 to 5.

## EXECUTORS AND ADMINISTRATORS.

1. It is the right and duty of an executor or administrator of a deceased debtor, whose estate is insolvent, to impeach a sale of personal property made by the deceased, with intent to defraud creditors, and recover the same from the fraudulent vendee. *Per DENIO, J. Bate v. Graham*, 287

2. Ordinarily, a creditor of the estate cannot maintain an action against such fraudulent vendee alone, or against him and the executor or administrator, to set aside the fraudulent transfer, and have the property held under it administered as assets to pay debts. *Per DENIO, J.* *id*

3. But if the executor or administrator collude with the fraudulent vendee, or after reasonable request refuse to take proceedings to im-

peach his title and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator, for that purpose. *id*

4. Where a debtor in his lifetime assigned a chose in action with intent to defraud creditors, and his estate being insolvent, the administrator denied that the assignment was fraudulent and insisted that it ought not to be set aside; *Held*, that a creditor could maintain an action against the assignee and administrator to have the assignment declared void as to creditors, and the chose in action administered as assets to pay debts. *id*

5. On the death of a tenant from year to year, whose estate arises out of a demise to him, the estate passes to his personal representatives, and they hold it by virtue of the demise. And where the executors of the tenant omitted to terminate the tenancy and continued to occupy the premises from year to year; *Held*, that they were liable in their representative capacity for the rent accruing during such occupancy by them; and that a demand for this rent was properly united with a demand for rent accruing during the lifetime of the tenant, in a suit against the executor. *Pugsley v. Aikin*, 494

## F

### FEEES OF OFFICERS.

*See* ATTORNEYS AND SOLICITORS.

### FIXTURES.

Poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, are a part of the real estate. *Bishop v. Bishop*, 123

### FORCIBLE ENTRY AND DETAINER.

*See* RELIGIOUS SOCIETIES, 1 to 3.

## FORECLOSURE BY ADVERTISEMENT.

*See* MORTGAGE OF LAND.

## FOREIGN LAW.

*See* PLEADING, 2, 3.

## FRAUDULENT CONVEYANCES.

[*Delaying Creditors.*]

1. An assignment by an insolvent debtor of his property to trustees for the benefit of his creditors, which expressly authorizes them to sell the property *upon credit*, is void as against the creditors of the assignor. *Kellogg v. Slauson*, 202
2. But an assignment will not be construed as conferring this authority, where its language is consistent with a different interpretation which makes it legal and valid. *id*
3. Where the assignment authorized the trustees to take possession of the property and sell and dispose of the same *upon such terms and conditions* as in their judgment might appear best and most for the interests of the parties concerned, and convert the same into money; *Held*, that it was valid. *id*

*See* EXECUTORS AND ADMINISTRATORS, 1 to 4.

## FRAUDULENT VENDOR.

*See* EXECUTORS AND ADMINISTRATORS, 1 to 4.

## FRAUD.

1. Where a mortgage does not cover all of premises owned by the mortgagor which he by false and fraudulent representations induced the mortgagee to believe were included therein, when the latter made a loan and accepted it as security therefor, a court of equity will, as against the mortgagor or his voluntary grantee, reform the mortgage and enforce it against the part of the premises not origi-

nally embraced therein. *De Peyster v. Hasbrouck*, 582

2. Where an applicant for a loan proposed to secure its repayment by a mortgage upon premises which he stated had been conveyed to him by a party named, and by false and fraudulent representations induced the lender to believe that certain valuable erections, which were situate on adjacent premises owned by the applicant, were upon the premises so conveyed to him, and the lender made the loan and accepted a mortgage executed by the applicant containing a description which included only these premises, believing, and the applicant representing to him that the erections were embraced, and the mortgagor soon thereafter conveyed the land on which the erections were situate, without consideration, in trust for his wife; in an action by the mortgagee against the mortgagor, his wife and her trustee, the trust deed was adjudged invalid against the mortgage, the latter was reformed so as to embrace the land with the erections thereon, and a decree of foreclosure and sale was made as to all the premises. *id*

## G

## GUARDIAN.

*See* INFANT, 8 to 10.  
SPECIFIC PERFORMANCE.  
SURREGATE'S COURT.

## H

## HOP-POLES.

*See* FIXTURES.

## HUSBAND AND WIFE.

*See* MARRIAGE.

## I

## INDIVIDUAL LIABILITY.

*See* STOCKHOLDERS.

## INEVITABLE ACCIDENT.

*See* CONTRACT, 4.

## INFANTS.

1. Neither infants or their guardians appointed for that purpose can convey land, except pursuant to the order of the court. *In the matter of Hyatt v. Seeley*, 52
2. Where the order directed infants to convey all their interest in certain real estate, the deed to be executed by Josiah S. Mitchell, their guardian ad litem, in the name and behalf of the infants; HELD, that a deed, reciting the appointment of Mitchell as their guardian, in which they were named as parties of the first part without the guardian's name being mentioned, and which was executed and acknowledged by the infants, and by Josiah S. Mitchell, without any addition to his signature indicating the character in which he executed, was not pursuant to the order, or one which the purchaser was bound to accept. *id*
3. Under such an order, a deed containing the names of the infants, "by Josiah S. Mitchell their guardian," as parties of the first part, but executed by him, by subscribing "Josiah S. Mitchell guardian &c." is defective. *Per SELDEN, J. id*
4. The guardian should execute the deed by subscribing the name of the infant, and adding "by Josiah S. Mitchell his guardian ad litem." *Per SELDEN, J. id*
5. Whether, if the ancestor contracts to convey with covenants as to title, the court has power on an application under the statute for specific performance, to require the heir to convey by a deed containing personal covenants, *quere*. *Per SELDEN, J. id*
6. But where the order of the court merely directs the infants to convey their interest, personal covenants inserted in a deed executed on their behalf are void. *Per SELDEN, J. id*
7. Where the order in its recitals mentions five minor heirs, and that J. S.

- Mitchell had been appointed guardian of said minors, but omits the names of two of them in that part directing a conveyance, a deed executed by the guardian on behalf of all, passes no title as to the two. *Per DENIO, J.* *id*
8. The object of the statute, (2 R. S. 195, § 180,) which declares that the proceeds of an infant's lands sold by order of the court of chancery, shall be deemed real estate, was to preserve during his minority the character of the property in reference to the statutes regulating descents and distributions. *Forman v. Marsh*, 544
9. The character impressed upon the proceeds by the statute ceases on the infant's attaining his majority and obtaining possession thereof. *id*
10. Where real estate of an infant was sold under the direction of the court, and a bond and mortgage thereon were executed to his special guardian to secure the purchase money; and the infant, after his majority, settled the guardian's account touching the trust, and discharged him therefrom, took from him individually a receipt for the bond and mortgage, and constituted him his attorney to collect and reinvest the amount secured thereby in his discretion, and before payment of any part of the amount died intestate; *Held*, that the bond and mortgage and the moneys secured thereby were personal estate, and to be distributed as such. *id*
11. A policy of insurance against the usual perils of the sea or lakes, the underwriters do not insure against the negligence of the master and mariners as a distinct cause of loss; and where such negligence is the sole procuring cause of the loss, they are not liable. *id*
12. Where a collision happened between the insured vessel and another, by which the latter sustained damages, and her owners filed a libel against the insured vessel, alleging that the collision was occasioned by the negligence of her master and crew, and after interposition of claim and defense by her owners and notice to the insurers of the proceedings, she was condemned and ordered to be sold to pay such damages; *Held*, that the underwriters were not liable to the owners of the insured vessel for the amount of such damages which they were compelled to pay to prevent her being sold. *id*
13. A policy, by which property was insured against loss or damage by fire, contained a condition that the insurer would not be liable for any loss occasioned by the explosion of a steam boiler; and there was an explosion of a steam boiler in use in the building where the property was situated, whereby fire was brought in contact with and consumed the property; *Held*, that the loss was within the exception created by the condition, and the insurer not liable. *St. John v. The American Mutual Fire and Marine Insurance Company*, 516

## INSURANCE.

1. In cases of insurance, the law, in the absence of fraud, looks to the proximate cause only of the loss in determining whether it was caused by a peril insured against. - *Mathews v. The Howard Insurance Co.*, 9
2. A collision is a peril within a policy insuring against the perils of the sea or lakes. *id*
3. Where the immediate cause of loss to a vessel is a peril expressly insured against, it is not a defense that the negligence of the master and crew occasioned such peril or brought her within it. *id*
4. Under a policy of insurance against the usual perils of the sea or lakes, the underwriters do not insure against the negligence of the master and mariners as a distinct cause of loss; and where such negligence is the sole procuring cause of the loss, they are not liable. *id*
5. Where a collision happened between the insured vessel and another, by which the latter sustained damages, and her owners filed a libel against the insured vessel, alleging that the collision was occasioned by the negligence of her master and crew, and after interposition of claim and defense by her owners and notice to the insurers of the proceedings, she was condemned and ordered to be sold to pay such damages; *Held*, that the underwriters were not liable to the owners of the insured vessel for the amount of such damages which they were compelled to pay to prevent her being sold. *id*
6. A policy, by which property was insured against loss or damage by fire, contained a condition that the insurer would not be liable for any loss occasioned by the explosion of a steam boiler; and there was an explosion of a steam boiler in use in the building where the property was situated, whereby fire was brought in contact with and consumed the property; *Held*, that the loss was within the exception created by the condition, and the insurer not liable. *St. John v. The American Mutual Fire and Marine Insurance Company*, 516
7. A policy of insurance against loss by fire, which describes the subject matter as a barque on the stocks, near a ship in a ship yard, being built for Howes, Godfrey & Co., does not cover timbers not united to the keel or structure thereon of the contemplated barque, although they are intended and completely prepared to be used in its framework, are lying in the yard in the proper place to be conveniently applied to that use, and are valueless for any other vessel. *Hood v. The Manhattan Fire Insurance Company*, 532

8. Such a policy covers the structure made from time to time on the stocks, which, when completed, will constitute the barqueus. *id*

9. A condition in a policy of insurance upon a building, which prohibits its being appropriated, applied or used for the purpose of storing or keeping therein certain articles denominated hazardous, is not violated by a mere temporary or casual deposit of such articles in the building. *Hynds v. The Schenectady County Mutual Insurance Company*, 554

10. But if the building or any part thereof is used for the purpose either of storing or of keeping therein prohibited articles, it is a violation of the condition. *id*

### INTEREST.

A sum of money, payable by an instrument in which interest is not mentioned, and which does not specify any time of payment, or that the money is payable on demand, draws interest from the date of the instrument. *Purdy v. Philips*, 406

See RENT, 2.

### J

#### JUDGMENT

[*By Confession.*]

See APPEAL, 9, 10.

[*In an action of Tort against several.*]

See DAMAGES.

[*On alleged Joint Contracts.*]

See PRACTICE, 2, 8.

#### JUDGMENT AND EXECUTION.

See CONSTITUTIONAL LAW, 1, 2.  
MORTGAGE OF CHATELS.  
SHERIFF.

#### JURISDICTION.

See ABSCONDING &c. DEBTOR, 1 to 7.  
TAXES, 8 to 7.

### JUSTICE OF THE PEACE.

See COURTS OF JUSTICE OF THE PEACE.

### L

#### LABORERS ON PUBLIC WORKS.

1. The statute (*Laws of 1850, ch. 278*) requiring a contractor with the state to execute, with sufficient sureties, a bond conditioned that he will pay all laborers employed by him on the work specified in his contract, does not provide for securing the payment of laborers employed in constructing the work by a person to whom it is sub-let by the contractor. *McCluskey v. Cromwell*, 598

2. The bond executed pursuant to this statute, is security only that the contractor with the state, will pay the laborers to whom he shall be indebted. *id*

3. Where he sub-lets the work, and the sub-contractor hires laborers to perform it and omits to pay them, they cannot sustain an action on the bond for their wages. *id*

4. Nor can they do so, although the contractor, by the terms of his contract with the state, was bound to perform the work by workmen under his immediate superintendence and not by a sub-contractor, and although the sub-contracting was without the consent of the state or its officers, and the work done by the laborers for the sub-contractor was estimated by the state officers and paid for to the contractor as though done by him. *id*

5. The rules which should prevail in the construction of statutes, discussed. *Per ALLEN and RUGGLES, Js.* *id*

#### LANDS OF INFANTS,

[*Sold by order of Court.*]

See INFANTS, 8, 9, 10.

## LANDLORD AND TENANT.

1. A wrongful eviction of the tenant by the landlord from a part of the demised premises suspends the rent until the possession is restored. *Christopher v. Austin*, 216
2. The landlord cannot recover, on the agreement to pay rent, a portion thereof, or any compensation for the part of the premises occupied by the tenant while such eviction continued. *id*
3. Nor can he recover, in an action for use and occupation, the value of the part of the demised premises enjoyed by the tenant during the term, and while deprived of the residue by such eviction. *id*
4. Where premises were demised by an agreement not under seal, for a year, at the rent of \$200, payable quarterly, and the landlord, before any rent became payable, wrongfully entered and evicted the tenant from a part of the premises, but the latter voluntarily occupied the residue to the end of the term, when the landlord brought an action for use and occupation; *Held*, that he could not recover. *id*
5. Where the tenant is evicted from a part of the premises by title paramount to the lessor's, the landlord may recover for the portion of the premises enjoyed by the tenant. *Per PARKER, J.* *id*
6. Where premises are leased "for the term of one year and an indefinite period thereafter," at an annual rent which the lessee agrees to pay, and he enters and occupies several years, he is the owner of an estate as tenant from year to year, arising out of the original demise. *Pugsley v. Aikin*, 494
7. On the death of the tenant this estate passes to his personal representatives, and they hold it by virtue of the demise to him. And where the executors of the tenant omitted to terminate the tenancy and continued to occupy the premises from year to year; *Held*, that they were liable in their representative capacity for the rent accruing during such occupancy by them; and that a demand for this rent was properly united with a demand for

rent accruing during the lifetime of the tenant, in a suit against the executors. *id*

*See RENT, 1.*

## LEASE FROM YEAR TO YEAR.

*See LANDLORD AND TENANT, 6, 7.*

## LEX LOCI ET FORI.

*See PLEADING, 2, 3.*

## LIMITATIONS, STATUTE OF.

1. Payments made by one of the joint and several makers of a note and indorsed upon it, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defense of the statute as to the other. *Shoemaker v. Benedict*, 176
2. Where three made a joint and several note payable in February, 1839, and payments were made by one and indorsed upon it, in 1839, 1840, December, 1843, and January and September, 1849, and a suit was commenced upon it in July, 1850, to which one of the others pleaded the statute of limitations; *Held*, that the action was barred as against him. *id*

## LIMITED PARTNERSHIPS.

*See PARTNERSHIP, 1, 2, 3.*

## LIMITATION OF APPEAL.

*See APPEAL, 4, 5.*

## LOTTERIES.

*See PLEADING, 2, 3.*

## M

## MANDAMUS.

1. Where the assessors of a town without jurisdiction assess a person for personal estate, and the assessment roll made by them is duly returned to



the board of supervisors, and a tax is imposed by the supervisors upon the person for such personal estate, which is collected by a seizure and sale of his property upon the warrant issued by the supervisors to the collector, the supervisors cannot be compelled by writ of mandamus to audit and allow to the person thus wrongfully assessed, the amount of the tax collected from him, and direct it to be levied upon the town or county. *The People ex rel Mygatt v. The Supervisors of Chenango County*, 563

2. As a general rule, the writ of mandamus will not lie where the party aggrieved has an ample remedy by an action at law. *id*
3. This writ lies to give effect only to a clear legal right. *id*

#### MANUFACTURING CORPORATIONS.

See STOCKHOLDERS, 1, 2, 3.

#### MARRIAGE.

1. The act of 1813, concerning divorces, (2 R. L. 197, § 4,) prohibited a person whose marriage was dissolved, pursuant to its provisions, on account of his or her adultery, from marrying again during the life of the other party to the dissolved marriage. *Cropsey v. Ogden*, 228
2. Such person was not competent during the lifetime of the former husband or wife, and while said act was in force, to make a valid contract of marriage within this state. *id*
3. The revised statutes, (2 R. S. 189, § 5,) prohibit a person from contracting a valid marriage during the lifetime of any former husband or wife, where the former marriage was dissolved on account of the adultery of such person. *id*
4. To bring a person within this prohibition it is not requisite that the former marriage should have been contracted after the revised statutes took effect. *id*

5. Nor that the relation of husband and wife should have existed by virtue of the former marriage since that time. *id*
6. Where a marriage contracted in this state, was in the year 1822 dissolved by the decree of the court of chancery on account of adultery by the husband, and afterwards in 1825, and again subsequent to the first of January, 1880, during the lifetime of his former wife, a marriage was solemnized in due form within this state, between him and the plaintiff, with whom he cohabited as his wife till his death in 1847; *Held*, that each of these marriages with the plaintiff was void, and that she was not entitled to dower in the lands of which he died seised. *id*

#### MARINE INSURANCE.

See INSURANCE, 1 to 5.

#### MASTER AND SERVANT.

See ACTION ON THE CASE.  
SEDUCTION.

#### MORTGAGE OF LAND.

1. In foreclosing a mortgage by advertisement pursuant to the statute, it is not requisite that copies of the notice of sale should be served on the parties entitled thereto personally, or by leaving the same at their dwellings, *though they reside in the same place* with the party foreclosing, or his attorney. *Stanton v. Kline*, 196
2. In such case, it is a compliance with the statute, if copies of the notice are deposited in the post office at the place where the parties reside, directed to them respectively at such place, twenty-eight days prior to the time specified for the sale. *id*

See FRAUD.

#### MORTGAGE OF CHATTELS.

1. Chattels which are mortgaged may be seized and the interest of the mortgagor therein sold on an execu-

tion against the mortgagor, where they are in his possession, and he, at the time of the seizure and sale, is by the terms of the mortgage entitled to their possession for a definite period. *Hull v. Carnley*, 501

2. The officer making the seizure and sale is not liable to the mortgagee, although he sell the property generally without in any way recognizing the lien of the mortgage, and deliver possession of it to the purchaser. *id*

## N

### NEGLIGENCE.

*See ACTION ON THE CASE.*  
*INSURANCE*, 8, 4, 6.

### NEW-YORK CITY.

1. Under the act of 1806, which enacts that in all cases where "the mayor, aldermen and commonalty of the city of New-York, shall think it for the public good to enlarge any of the slips in the said city, they shall be at liberty and have full power so to do, and upon paying one third of the expense of building the necessary piers and bridges, shall be entitled not only to the slipage of that side of the said piers which shall be adjacent to such slips respectively, but also to one half of the wharfrage to arise from the outermost end of the said piers," the corporation has the power to build piers, and to extend them into the river for the purpose of enlarging the slips. *Thompson v. The Mayor &c. of New-York*, 116
2. The word *slip* in this act designates the intermediate space formed by the docks. *id*
3. Within the meaning of this act a slip may be enlarged by building and extending piers into the river. *id*
4. It is not requisite that the piers on each side should be extended equally or at the same time. *id*
5. Where the corporation of New-York was the owner of and entitled to receive one half of the wharfrage arising from the end of a pier, and annually demised and let the same and the right to collect and receive it to lessees; *Held*, that it was not sufficient to establish title thereto by prescription in the owner of the other one half, that he had collected and appropriated to his own use the whole wharfrage during thirty years, without obstruction from the city or its lessees. *id*
6. Under such circumstances, there should be proof of knowledge by or notice to the corporation of an adverse claim and enjoyment to establish title by prescription against it. *id*
7. Section 224 of the act of 1813 reducing the laws relating to the city of New-York into one act, (2 R. L. 483,) is not applicable to the construction of a pier, where the corporation owns the lots opposite the place where it is to be built. *Marshall v. Guion*, 461
8. In such a case the corporation has authority to construct the pier at the expense of the city, and take the emoluments arising from it for its benefit. *id*
9. Where the corporation granted to an individual a water lot on the East river, and he covenanted to construct in front of it, on the river, a street which should be and remain a public street of the city, and did so, and the corporation covenanted that the grantee should enjoy the wharfrage arising from the bulk head created by the street which for a time he received; and subsequently the corporation acquired title to the granted premises pursuant to §§ 177 and 178 of the act of 1813 for the purposes of a street; and afterwards the corporation directed to be constructed opposite these premises a pier, which thenceforth formed the side of a public slip, which pier was built at the joint expense of the corporation and the proprietors of lots adjacent to said granted premises, and the emoluments therefrom were shared between them and the city in certain proportions: subsequently the corporation directed this pier to be extended into the river, and invited the said proprietors to unite in constructing the extension, the expense and emoluments thereof to be borne and shared in the same proportion as were those of the origin-

al pier, which they refused to do, and the corporation at the expense of the city extended the pier; *Held*, that the corporation had authority to do so, and that the wharfage arising from this new portion of the pier belonged to the corporation. *id*

*See* ACTION ON THE CASE.

O

OFFICERS.

*See* ATTORNEYS AND SOLICITORS.  
PLANK ROAD COMPANIES, 16.  
TAXES, 1, 2, 4, 5, 6.  
SHERIFF, 1 to 5.

P

PARENT AND CHILD.

*See* SEDUCTION.

PARTIES.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 5 to 7.  
PLANK ROAD COMPANIES, 16.  
PRACTICE, 2, 8.  
WITNESS.

PARTNERSHIP.

1. Where a limited partnership is dissolved by the agreement of the parties before the period fixed for its termination by the original certificate, it continues as to persons crediting the firm without actual notice of such dissolution, until the notice required by the statute has been filed, recorded and published for four weeks, as therein prescribed. *Beers v. Reynolds & Maginnis*, 97
2. If any alteration be made in the capital or shares and the partnership be in any manner thereafter carried on, before the publication of the notice is completed, the special partner becomes liable as a general partner. *id*
3. Where parties to a limited partnership agreed to dissolve it and caused notice of such dissolution to be filed and recorded, and commenced its publication, and the special partner

at the same time sold his interest in the copartnership effects to the general partner, who secured the price by a mortgage on the effects and other property and a judgment, and continued the same kind of business, and afterwards and before the publication of the notice was completed, purchased goods of the plaintiff who had no actual notice of the dissolution; *Held*, that the special partner was liable to the plaintiff as a general partner, without reference to the intent with which the dissolution took place and the mortgage and judgment were taken. *id*

PAYMENT.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 8.

PERFORMANCE.

*See* CONTRACT, 3, 4.  
PLEADING, 1.

PLANK ROAD COMPANIES.

1. It is not requisite to the incorporation of a plank road company under the general act, that the whole amount of the capital stock should be subscribed before filing the articles of association. *The Schenectady and Saratoga Plank Road Company v. Thatcher*, 102
2. It is sufficient that stock to the amount of \$500 for every mile of the proposed road is in good faith subscribed and five per cent paid thereon. *id*
3. The directors have authority to require payment of subscriptions for stock before the whole capital is subscribed. *id*
4. A subscriber to the stock in a proposed company, who is present at the first election, and is there elected a director and acts as one of the board, will not be permitted afterwards, in a suit against him by the company, to object to the validity of its organization on the ground that no notice of such election was given,

- and that some of the subscribers did not attend. *id*
5. A person is liable to the company for the amount of his subscription, although after calls were made, and before they were payable, he assigned his stock to a responsible party and had it transferred to and an account opened with him on the books of the company. *id*
6. It is not a defense to a subscriber to stock, who as a director of the company, voted for the resolution requiring payment of subscriptions and delivered to other subscribers notices thereof, that notice of the required payments was not given to him pursuant to the 39th section of the act. *id*
7. Where a company was incorporated in 1848, under the plank road act of 1843, and the defendant then subscribed to its stock, and the company, by virtue of a subsequent act of the legislature, without his consent, increased its capital and applied its funds to the construction of a branch road, not authorized by its original organization; *Held*, that the defendant was not thereby released from his subscription. *id*
8. Section 1 of chapter 398, of the laws of 1847, does not repeal or modify section 26 of the general plank road act, (*Chapter 210 of Laws of 1847.*) *Palmer v. The Fort Plain and Cooperstown Plank Road Co.* 376
9. The two sections are to be construed together in determining the power of the supervisor and commissioners of highways to contract with a plank road company, as to its taking and using a highway of the town for the construction of its road. *id*
10. They have authority to agree with the company upon the compensation and damages to be paid for taking and using the highway, and to grant the right to do so. *id*
11. But they have not power to grant the company this right on condition that it shall erect and maintain its toll gates in specified localities. *id*
12. Nor are they authorized to make a contract with the company granting it this right, and, as a consideration therefor, obligating it not to locate and maintain a toll gate within a specified limit. *id*
13. A naked condition inserted in a grant does not create any agreement on the part of the grantee accepting the thing granted, to perform the condition. *id*
14. In such a case, specific performance cannot be enforced by action. The remedy for a breach of the condition is by a proceeding to recover the thing granted. *id*
15. Where the right to take and use a highway for the construction of a plank road was granted to a company upon condition that it should not maintain a toll gate within certain limits; and the company, by virtue of the grant, took possession of the highway but afterwards violated the condition, and an action was brought to compel the company to observe it; *Held*, that the action could not be sustained. *id*
16. The supervisor and commissioners of highways of a town cannot maintain a suit in their joint names as such officers, on a contract made by them on behalf of the town, which contains no express agreement with them, as such officers. *id*

## PLEADING.

1. Under an averment of performance of a covenant, evidence in excuse for non-performance is not admissible. *Per ALLEN, J. Oakley v. Morton.* 26
2. Where a party seeks to enforce in the courts of this state a contract which by its laws is forbidden and declared void, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid. *Thatcher v. Morris,* 437
3. Where a suit to recover prize money drawn by tickets owned by the plaintiff in a lottery alleged to be authorized by and established pursuant to the laws of Maryland by the defend-

ants, and drawn at Baltimore, the complaint did not state *where* the tickets were sold or purchased by the plaintiff; *Held*, on demurrer, that the complaint did not state a cause of action enforceable in the courts of this state. *id*

4. Where a party by an instrument in writing signed by him, and dated the 6th of September, 1839, for value received, agrees to purchase of another at the expiration of one year from the date of the instrument, stock at a price named, the sale and transfer of the stock and the payment of the price are dependent acts to be concurrently performed. *Lester v. Jewett*, 453

5. To entitle a vendor to recover upon the agreement, he must aver and prove a tender, or offer to sell and transfer the stock to the party contracting to purchase, at the expiration of the year. *id*

6. A count averring that he was ready and willing to sell and transfer the stock at the time named therefor in the instrument, is bad on demurrer. *id*

7. But a count upon the agreement which averred that the vendor was ready and willing, and at the expiration of one year from the date of the instrument, to wit, on the 7th of September, 1840, offered to the purchaser to sell and transfer to him the stock, is sufficient. *id*

8. Where the time stated under a *vide licet* is repugnant to the previous allegation, it will be rejected. *id*

See SLANDER.  
VARIANCE.

#### POWER.

[To be executed with the consent of third Persons.]

1. By the common law, where a power was to be executed with the consent of third persons, the death of one of such persons before consent given, rendered the execution of the power impossible. *Barber v. Cary*, 397

2. This rule of law has not been changed by the revised statutes. Section

112 (1 R. S. 785) is applicable to grantees of a power, not to third persons whose consent is requisite to its execution. *id*

3. Where land was devised to a son for life and then to his heirs, with power to him to sell and convey the same, by and with the consent of his mother and brother, and she died without consenting, and the son afterwards, with the consent of his brother, sold and conveyed the land; *Held*, that no title passed by virtue of the power. *id*

#### PRACTICE

1. A request to charge the jury should be in such form, that the court may charge in the terms of the request without qualification. *Carpenter v. Stilwell*, 61

2. The code of procedure has modified the general common law rule, that, in an action upon an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action. *Brumskell v. James*, 294

3. In an action against two persons upon a note alleged to have been made by them in 1846, as copartners in their firm name, it was proved that the note was signed by one in the alleged firm name, and that the other defendant was then his wife; *Held*, that the plaintiff could recover against the husband alone. *id*

4. Where the charge of the court involves several propositions, and as to some of them it is unobjectionable, an exception taken at its conclusion to each and every part of the charge, presents no question for review on a bill of exceptions. *Caldwell v. Murphy*, 416

5. Exceptions are sufficiently specific where it appears that each offer or request was separately made and passed upon, and each ruling excepted to. *Dunkle v. Wiles*, 420

6. Since the enactment of the code of procedure it is not requisite, in order to review questions of law arising upon the trial, that the exceptions

taken should be signed or sealed by the justice before whom the trial was had, or that a bill of exceptions be made. *Zabriskie v. Smith*, 480

7. Where, on an appeal to this court, it appears by the return that the exceptions were taken at the trial and separately stated, it is not necessary that they should be authenticated by the justice who tried the cause, or the court below. *id*

8. But where the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising upon them, the party desiring a review in this court should procure the exceptions to be separated from the case by or under the direction of the court below, or a justice thereof. *Per JOHNSON, J.* *id*

9. If it does not appear from the return either that the exceptions were in the first instance stated separately, or that they were separated from the case in which they were originally stated under the direction of the court below or a judge thereof, the appeal to this court will be dismissed. *Per JOHNSON, J.* *id*

10. The supreme court is authorized by the revised statutes (2 R. S. 199) to compel a defendant in a suit pending therein to make discovery of books, papers and documents in his possession or power relating to the merits thereof, and which are necessary to the plaintiff to enable him to prepare for the trial. *Gould v. McCarty*, 575

11. The 388th section of the code is not a substitute for the provisions of the revised statutes, but is auxiliary thereto. • *id*

12. The superior court of the city of New-York has the same powers to compel discovery by the parties to a suit pending therein, which are conferred by the revised statutes upon the supreme court; (*Laws of 1841, p. 22;*) and where the defendant, in an action pending in that court, refused to comply with an order directing him to make discovery, to enable the plaintiff to prepare for trial; *Held*, that the court was authorized to strike out his answer, and render judgment

as though no answer to the complaint had been made. *id*

*See* ABSCONDING, &c. DEBTORS, 2 to 6.  
APPEAL, 4, 5, 9, 10.  
DEPOSITION, 1 to 10.  
DISCOVERY OF BOOKS AND PAPERS.

## PREScription.

1. Where the corporation of New-York was the owner of and entitled to receive one half of the wharfage arising from the end of a pier, and annually demised and let the same and the right to collect and receive it to lessees; *Held*, that it was not sufficient to establish title thereto by prescription in the owner of the other one half, that he had collected and appropriated to his own use the whole wharfage during thirty years, without obstruction from the city or its lessees. *Thompson v. The Mayor &c. of New-York*, 115
2. Under such circumstances, there should be proof of knowledge by or notice to the corporation of an adverse claim and enjoyment to establish title by prescription against it. *id*

## PRINCIPAL AND AGENT.

*See* ACTION ON THE CASE.  
BILLS OF EXCHANGE AND PROMISSORY NOTES.  
TAXES, 1, 2.

## PROCESS OF COMMITMENT.

*See* SURREGATE'S COURT, 4, 5, 6.

## R

### RAIL ROADS.

" *See* APPEAL, 8.

### RECORD OF JUDGMENT.

*See* EVIDENCE, 10, 11, 12.

### REFEREE'S FEES.

*See* ATTORNEYS AND SOLICITORS.

REFORMING INSTRUMENTS.

See FRAUD.

RELIGIOUS SOCIETIES.

1. The title to property acquired by a religious society incorporated under the general statute vests in the corporation. *The People v. Fulton*, 94
2. While its real estate is under the control of the trustees, the legal possession is in the corporate body. *id*
3. Proceedings under the statute for a forcible entry and detainer of a church owned by such society should be in the name of the corporation. Such proceedings cannot be sustained in the individual names of the trustees. *id*
4. A religious corporation created under the general act consists not of the trustees alone, but of the members of the society. *Robertson v. Bullions*, 248
5. The society is incorporated and its members are the corporators. *id*
6. The relation of the trustees to the society is not that of a private trustee to the *cestui que trust*. *id*
7. They are trustees only in the same sense in which the directors of a civil corporation are such. *id*
8. They are the managing officers of the corporation, invested as to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations. *id*
9. Religious societies incorporated under the act, are not ecclesiastical corporations in the sense of the English law. *id*
10. They are to be regarded as civil corporations, governed by the ordinary rules of the common law. *id*
11. A court of equity has not power to remove the trustees elected pursuant to the statute. *id*
12. Nor has it power to require qualifications in the electors of trustees, other than those prescribed by the statute. *id*
13. The trustees cannot take a trust for the sole benefit of members of the church as distinguished from other members of the society, or for the use of a portion of the corporators, to the exclusion of others. *id*
14. They cannot receive a trust limited to the support of a particular faith or a particular class of doctrines. *Per SELDEN, J.* *id*
15. Where in a conveyance in trust for religious purposes the use is expressed in general terms, it cannot be inferred from the religious faith of the grantor that it was intended to limit the use to the support of the particular doctrines in which he believed. *id*
16. Where the language creating the trust is ambiguous, evidence of the faith of the donor, like that of surrounding circumstances, may be received to aid in the construction. *id*

RENT.

1. Where rent is payable in wheat, fowls, and services on a day named in each year during the term, "at the North river within the county of Columbia, or within lot No. three (situated in said county) as the lessor shall from time to time direct," the lessor can sustain an action on the lease for the value of the rent, without averring or proving that he directed the lessee where to deliver the articles or perform the service. *Livingston v. Miller*, 80
2. In such a case interest is recoverable on the value of the rent from the time it became payable. *id*

See LANDLORD AND TENANT, 1 to 7.

RESERVATION.

See DEED, 4, 8.

REVOCATION.

See EVIDENCE, 1, 2.

## SEDUCTION.

1. The action for seduction can be sustained, where the relation of master and servant exists actually or constructively between the plaintiff and the person seduced at the time of the seduction. *Mulvehill v. Millward*, 848
2. It is not requisite that a minor daughter should be actually in the service of or residing with her father at the time of the seduction, to entitle him to maintain the action. *id*
3. It is sufficient that he was then legally entitled to her services, and might have required them if he chose to do so. *id*
4. Where a minor daughter left her father's and went to work for the defendant, and was seduced and became pregnant by him while in his employ, and remained absent from home till after her confinement and recovery; and there was no proof that the father took care of or expended any thing on her account during her sickness; *Held*, that he could recover damages of the defendant for her seduction. *id*

## SHERIFF.

1. A sheriff, upon whom a fine has been imposed by the court to the amount of an execution issued to him, for willful neglect of his duty in regard to it, and who pursuant to the order of the court has paid the fine to the judgment creditor, has no authority to enforce the execution against the debtor for his own indemnity. *Carpenter v. Stihpell*, 61
2. Nor has he authority to do so where the amount of the fine was paid with his moneys by a third person, and the judgment assigned to such third person to be held for the sheriff's benefit. *id*
3. In selling property under an execution, a sheriff acts by virtue of a power: if the power does not exist, no title passes. *id*
4. Therefore, where a sheriff was fined by the court to the amount of an

execution in his hands, for neglecting to return it, and after the fine had been paid to the judgment creditor with moneys of the sheriff, and the judgment assigned to a third person for his benefit, the sheriff sold the real estate of the debtor on the execution, and executed a deed of the same to a judgment creditor who redeemed; *Held*, that the sale was void, and no title passed by the deed. *id*

5. An officer cannot execute final process in his own favor, or for his own benefit. *id*

## See MORTGAGE OF CHATTELS.

## SHIPS AND VESSELS.

See INSURANCE, 7, 8.

TITLE TO PROPERTY, 1, 2, 3.

## SLANDER.

1. Since the enactment of the code of procedure, the defendant in an action for slander or libel, may prove in mitigation of damages, facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge. *Bush v. Prosser*, 847
2. It is not necessary that the answer should allege the truth of the charge complained of, to entitle the defendant to aver and prove such facts and circumstances to reduce the amount of damages. *id*
3. Accordingly, where in an action for charging the plaintiff with keeping a house of ill fame, the answer denied the complaint, and as a partial defense alleged lewd and lascivious conduct by the plaintiff's family, not amounting to a justification of the charge; *Held*, that evidence of such conduct was competent to reduce the amount of damages. *id*

## SPECIFIC PERFORMANCE,

[By Infant Heirs.]

1. Neither infants or their guardians appointed for that purpose can con-



vey land, except pursuant to the order of the court. *In the matter of Hyatt, administrator, v. Seeley*, 62

executed by the guardian on behalf of all, passes no title as to the two. *Per DENIO, J.* *id*

2. Where the order directed infants to convey all their interest in certain real estate, the deed to be executed by Josiah S. Mitchell, their guardian ad litem, in the name and behalf of the infants; HELD, that a deed, reciting the appointment of Mitchell as their guardian, in which they were named as parties of the first part without the guardian name being mentioned, and which was executed and acknowledged by the infants, and by Josiah S. Mitchell, without any addition to his signature indicating the character in which he executed, was not pursuant to the order, or one which the purchaser was bound to accept. *id*

3. Under such an order, a deed containing the names of the infants by "Josiah S. Mitchell their guardian," as parties of the first part, but executed by him, by subscribing "Josiah S. Mitchell guardian &c." is defective. *Per SELDEN, J.* *id*

4. The guardian should execute the deed by subscribing the name of the infant, and adding "by Josiah S. Mitchell his guardian ad litem." *Per SELDEN, J.* *id*

5. Whether, if the ancestor contracts to convey with covenants as to title, the court has power on an application under the statute for specific performance, to require the heir to convey by a deed containing personal covenants, *quere*. *Per SELDEN, J.* *id*

6. But where the order of the court merely directs the infants to convey their interest, personal covenants inserted in a deed executed on their behalf are void. *Per SELDEN, J.* *id*

7. Where the order in its recitals mentions five minor heirs, and that J. S. Mitchell had been appointed guardian of said minors, but omits the names of two of them in that part directing a conveyance, a deed

*See* PLANK ROAD COMPANIES, 18, 14, 15.

## SPECIAL PARTNER.

*See* PARTNERSHIP.

## SPECIAL PROCEEDING.

*See* APPEAL, 1, 2.

## STATUTES, CONSTRUCTION OF.

The act exempting certain property from levy and sale on executions, (*Stat. of 1842, p. 198.*) applies to judgments and executions on debts contracted before as well as after its passage. *Morse v. Gould*, 281

*See* APPEAL, 8.

CONSTITUTIONAL LAW, 1.

LABORERS ON PUBLIC WORKS, 5.

MORTGAGE OF LAND.

PLANK ROAD COMPANIES, 8, 9.

## STOCKHOLDERS.

1. The owners of stock are "the persons composing the company," within the 7th section of the act of 1811, relative to incorporations for manufacturing purposes. *Rossvell v. Brown*, 148

2. A person to whom stock is transferred on the books of the company and who upon such books appears to be the legal owner, is liable to creditors under the 7th section of the act, though it was transferred to and held by him as collateral security for a debt. *id*

3. Where D., the owner of stock in a company incorporated under the act of 1811, agreed with a firm to transfer it to B., one of its members, as collateral security for his indebtedness to the firm, and that the latter might sell sufficient of the stock to pay such indebtedness on a specified contingency; and D. in performance of the agreement transferred the stock to B. on the books of the company also-

lately, and it was so held by him when the company was dissolved; *Held*, that B. was individually responsible to a creditor of the company to the amount of the stock. *id*

#### SUBSCRIPTIONS FOR STOCK.

*See* PLANK ROAD COMPANIES, 3, 5, 6, 7.

#### SUPERIOR COURT.

*See* DISCOVERY OF BOOKS AND PAPERS.

#### SUPERVISORS.

*See* PLANK ROAD COMPANIES, 9 to 12, 16.  
TAXES, 7.

#### SUPREME COURT.

*See* APPEAL, 4, 5.

#### SURROGATE'S COURT.

1. A surrogate has jurisdiction to compel the guardian of a minor, appointed by him, to account as to the estate of the infant. *Seaman v. Durgea*, 324
2. On a final accounting he has authority to settle the account of the guardian, and determine the balance remaining in his hands. *id*
3. The surrogate's court may, by the decree made on such accounting, order the guardian to pay this balance to another guardian appointed in his stead, or to the ward, if he has attained his majority. *id*
4. For a neglect or refusal to comply with such decree, the guardian may be proceeded against in the surrogate's court, by attachment against his person, as for a contempt. *id*
5. It is not requisite that the process of commitment, issued by the surrogate in such a proceeding, should recite all the facts and proceedings necessary to confer jurisdiction. *id*
6. It is sufficient if upon its face it appears to have been issued in a pro-

ceeding of which the surrogate had jurisdiction, states in substance the cause of commitment, and specifies the act or duty to be performed, and the expenses to be paid. *id*

#### T

#### TAXES.

1. The assessors and collector are not in any legal sense the agents of the town, in its corporate capacity, in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duties. *Lorillard v. The Town of Monroe*, 392
2. Where land not situate within the town but in an adjoining county, was erroneously assessed by the assessors, and payment of the tax by the owner enforced by the collector of the town; *Held*, that the town was not liable in an action by the owner to recover the amount of the tax. *id*
3. Assessors have not jurisdiction to assess a person for his personal estate where he is not a resident of their town at the time when the assessment is made. *The People ex rel. Mygatt v. The Supervisors of Chenango County*, 563
4. One assessor cannot make the assessment; it must be made by all the assessors, or by a majority of them upon a meeting of all. *id*
5. And where one of the assessors, while engaged in ascertaining the names of the taxable inhabitants and the taxable property, called in May upon a person then a resident of the town, and made an entry of his name and the value of his taxable personal estate at \$10,000 and so informed him, and such person soon thereafter removed to another county; and afterwards in July the assessors prepared and completed the assessment roll, in which he was assessed for personal property to the value of \$10,000; *Held*, that the assessment was not made till July, and that the

assessors had no jurisdiction to make it. *id*  
*n*

6. Where, on such an assessment, the board of supervisors of the county impose a tax upon the party, which is collected by a seizure and sale of his property upon their warrant issued to the collector, the assessors are liable to him in an action for the amount of the tax and expenses of collection. *id*

7. But, in such a case, the supervisors cannot be compelled by writ of mandamus to audit and allow to the person thus wrongfully assessed, the amount of the tax collected from him, and direct it to be levied upon the town or county. *id*

#### TENANT FROM YEAR TO YEAR.

*See* LANDLORD AND TENANT, 6, 7.

#### TENDER OF PERFORMANCE.

*See* CONTRACT, 10 to 13.

#### TITLE TO PROPERTY.

1. The general rule is, that under a contract for the building of a vessel or other thing, no property vests in the person for whom it is agreed to be built until it is finished and delivered. *Andrews v. Durant*, 85

2. The rule is the same, where certain portions of the contract price are agreed to be and are paid to the builder at specified stages of the work, and where an agent of the person for whom the article is to be constructed, is to and does superintend and approve the materials and work. *id*

3. Therefore where A. contracted to build for B. a vessel of specified dimensions, and deliver it to him complete on a day named, for the price of \$5000; \$3000 to be paid at specified stages of the work, and \$2000 when it was completed and delivered, the workmanship and materials to be inspected and approved as the work progressed, by the superintendent of B., which was

done; *Held*, that B. had no property in the vessel before it was completed. *id*

#### TOWNS.

*See* PLANK ROAD COMPANIES, 2 to 12, 16.

TAXES, 1, 2.

#### TRUSTEES.

*See* RELIGIOUS SOCIETIES, 1 to 8, 11 to 14.

#### TRUSTS.

*See* RELIGIOUS SOCIETIES, 13, 14.

### U

#### USE AND OCCUPATION.

*See* LANDLORD AND TENANT, 1 to 5.

#### USURY.

1. A note, delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or himself, has no legal inception in his hands. If he negotiate the note upon an usurious consideration, it is void. *Callin v. Gunter*, 868

2. Where there was no direct evidence that an usurious agreement was made at the time of the loan; but it was proved that twenty-two days thereafter the borrower paid and the lender received for the use of the money, from the time of the loan to that day, a sum equal to interest at the rate of much more than seven per cent per annum, *Held*, that it was a question for the jury whether or not the loan was made upon an usurious agreement. *id*

3. The provisions of the code of procedure on the subject of a variance between pleadings and proofs, are applicable to cases in which usury is alleged and sought to be established. *id*

4. These provisions have changed the strict rule which formerly prevailed as to a variance in such cases. *id*
5. Where on the trial the evidence tended to prove an usurious agreement which differed from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the plaintiff gave no proof that he was misled thereby to his prejudice; *Held*, that the variance should be deemed immaterial. *id*

## V

## VARIANCE.

1. The provisions of the code of procedure on the subject of a variance between pleadings and proofs are applicable to cases in which usury is alleged and sought to be established. *Catlin v. Gunter*, 368
2. These provisions have changed the strict rule which formerly prevailed as to a variance in such cases. *id*
3. Where on the trial the evidence tended to prove an usurious agreement which differed from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the plaintiff gave no proof that he was misled thereby to his prejudice; *Held*, that the variance should be deemed immaterial. *id*

## VENDOR AND VENDEE.

*See* TITLE TO PROPERTY.

## W

## WILLS.

[*Of the execution and attestation of Wills.*]

1. A party seeking to establish an instrument as a will, must prove that all the requirements of the statute

were substantially complied with in its execution. *Lewis v. Lewis*, 220

2. Mere want of recollection on the part of the subscribing witnesses as to the prescribed formalities, will not invalidate the instrument as a will, if it is established by other evidence that it was executed according to the statute. *Per ALLEN, J.* *id*
3. But its due execution cannot be inferred or presumed from the fact that the attestation clause states that all the forms prescribed by the statute were complied with, where the contrary is proved. *Per ALLEN, J.* *id*
4. The acknowledgment by the testator of his subscription to the instrument, and his declaration that it is his will, are independent requisites to its proper execution, and it must be shown that each was complied with. *id*
5. Where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names it was so folded that they could not see whether it was subscribed by him or not; and the only acknowledgment or declaration made by him to them or in their presence as to the instrument was, "I declare the within to be my will and deed;" *Held*, that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute; and *held further*, that this language was not of itself a sufficient declaration that the instrument was his will. *id*

*See* EVIDENCE, 1 to 7.

## WITNESS.

1. In an action for a tort against two or more, each defendant is a competent witness for his co-defendant. *Beal v. Finch*, 128
  2. As to what matters he may give evidence, discussed. *Per PARKER, J.* *id*
- See* ASCENDING &c. DEBTOR, 5, 6.

END OF VOLUME ONE.

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